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In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. 168 [redacted]

MARION J. BELVEAL, ET AL.,
Petitioners,

v.

SOCONY MOBIL OIL CORPORATION,
CHARLES B. ATHEY, AND JACK D. HODGEN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Comes now Mobil Oil Corporation, one of the respondents herein, to urge that this cause should not be reviewed by this Honorable Court.

OPINIONS BELOW

The State court judgment under attack is reflected in a written opinion of the Court of Civil Appeals, Eighth Supreme Judicial District of Texas entered June 12, 1968. The opinion is reported at 430 S.W. 2d 529. Peti-

tioners have appended only a portion of the opinion to the Petition (A-1) and respondent Mobile now offers the entirety of the opinion to this Honorable Court for its consideration as Exhibit A to this Brief.

The Supreme Court of Texas has reviewed this opinion, and the record in this case, and has refused to disturb the Court of Civil Appeals judgment.

JURISDICTION

Some degree of prescience is necessary to understand petitioners' complaints, but as we grasp them, the petition urges:

> 1. Substantive due process has been denied; petitioners' proof was such that no reasonable court could reject it and hold with respondents. (Petition, pp. 6, 7, "Questions Presented" Nos. 11, 12, 13)
>
> 2. Procedural due process is lacking when a litigant contumaciously ignores a trial court discovery order, thereby denying his adversary the opportunity of preparing his case. (Petition, pp. 3-5, "Questions Presented" Nos. 1, 2, 3, 4, 6, 7)
>
> 3. Constitutional rights are abridged when a State court litigant is held to the requirements of State law concerning forms of action, parties, and quantum of proof. (Petition, pp. 4-6, "Questions Presented" Nos. 5, 8, 9, 10)

These claims are without merit. This is an action involving title to private lands, decided by State law. No substantial federal questions are present. We believe this Honorable Court will determine that jurisdiction should

not be accepted under *Angel v. Bullington*, 1947, 67 S. Ct. 657, 330 U.S. 183, 91 L. Ed. 832; *Equitable Life Assur. Soc. v. Brown*, 1902, 23 S. Ct. 123, 187 U.S. 308, 47 L. Ed. 190, and related decisions.

REASONS FOR DENIAL OF THE WRIT

(Statement of Facts, Argument and Authorities)

It will be necessary to correct the inaccuracies and omissions in petitioners' statement of the case in order to disclose the reasons why this cause should not be reviewed by this Honorable Court.

We proposed to discuss petitioners' claims in order. Under each area of discussion we will first refer to the record facts omitted by petitioners, and then present our argument and authorities. According, this brief will present

I. ***Substantive Due Process Was Afforded Petitioners***

A. The State Court Correctly Validated Mobil's Leasehold Estate.

1. The Record Facts

2. Analysis of the Facts and the Law

a. Fraud or Conspiracy

1. There is no evidence to support petitioners' claims

2. The claim comes too late

b. Athey's Authority to give Mobil a lease

1. Specific authority existed

2. Estoppel and Ratifications
3. Statute of Limitations

3. Conclusion — Mobil's Leasehold Estate

B. The State Court Correctly Overturned Petitioners' Summary Judgment to the Deeded Lands

1. The Recorded Facts
2. Analysis of the Facts and the Law
   a. The Mobil-Brim Relationship
   b. Mobil's Status as a Bona Fide Purchaser
3. Conclusion — Mobil's Deeded Lands

II. ***Procedural Due Process Was Afforded Petitioners***

A. Petitioners' Claims Re-examined

B. The Record Facts

C. Conclusion

III. ***No Constitutional Rights Were Abridged***

A. Petitioners' Claims Re-examined

B. Analysis of the State Court Judgment

C. Conclusion

IV. ***Conclusion***

* * * * *

To assist the Court in its understanding of the procedural posture of this case at this time, and since petitioners never quite get around to explaining what the case truly involves, a brief summary may be helpful.

Marion J. Belveal and other members of the Belveal family[1] filed suit in the District Court of Pecos County, Texas, against Socony Mobil Oil Company, Inc. (now Mobil Oil Corporation), Charles B. Athey, Jack D. Hodgden and J. K. Brim, asserting these claims:

> 1. Athey, an agent selected by the Belveals, violated his fiduciary duties to his principals, and committed fraud.
>
> 2. Athey's fraud was aided and furthered by the conspiratorial acts and conduct of Jack D. Hodgden and J. K. Brim.
>
> 3. J. K. Brim was an employee of Mobil Oil Corporation, and, therefore, Mobil is legally responsible for Brim's conduct.

The plaintiffs claimed that the effect of Athey's alleged fraud, in which Hodgden and Brim participated, was to deprive them of their undivided interest in certain lands and minerals located in Pecos County; specifically, they claimed they were defrauded of a 1/7 interest in Sections 44, 52 and 56, Block OW, Section 18, Block 143, and part of Section 15, Block 48, in Pecos County, Texas.

The plaintiffs' interest in the lands in question was leased for oil and gas exploration and development long prior to the conduct complained of by the plaintiffs; however, plaintiffs also claimed that their agent Athey wrongfully executed an "Extension of Lease" agreement in fraud of their rights and that Mobil was responsible for Athey's wrong.

---

[1] Petitioners will be referred to as "the Belveals" or "the plaintiffs" for ease of understanding. Respondents will be identified by name.

The relief sought by the plaintiffs in the trial court was for:

(1) Cancellation of each of seven deeds running from the plaintiffs to Athey;

(2) Cancellation of all deeds and conveyances out of Athey, with restoration of the properties to the plaintiffs;

(3) An accounting as to all profits attributable to the property covered by these deeds;

(4) Cancellation of the "Extension of Lease" agreement;

(5) An accounting as to all rents and revenues attributable to the property covered by this agreement; and

(6) The imposition of a constructive trust on any interest owned by any defendant in the lands conveyed by the Belveals to Athey.[2]

After depositions were taken and affidavits filed, the plaintiffs and Mobil each moved for summary judgment. After protracted hearings were held (proceedings which produced a transcript in excess of 1800 pages) the trial court held there to be no genuine issue of material fact and summary judgment for the plaintiffs was entered, thus denying all relief to the defendant Mobil. The trial court judgment, while not clear, can be interpreted to:

(1) Cancel the Belveal deeds to Athey covering undivided interests in the Pecos County property;

[2] The Belveals now claim this to be a principal objective in their suit. A detailed review of the 391 page Fourth Amended Petition reveals one reference to this theory, while theories of "fraud," "cancellation," "conspiracy," and "restoration of plaintiffs' property" are alleged in excess of one hundred times. Mobil will accept the Belveal claim that they *really* seek constructive trust relief in order to show that this does not affect the decision here.

(2) Order Athey, Hodgden and Mobil to execute deeds to convey to the Belveals various undivided interests in this property;

(3) Cancel the "Extension of Lease" agreement and declare the Belveal interests to be unleased as of March 20, 1962; and

(4) Order Athey, Hodgden and Mobil to "account to Plaintiffs" for moneys received attributable to the property covered by the canceled lease.

The trial court judgment was one of summary judgment, not default judgment as petitioners now pretend. That judgment was entered pursuant to Texas Rule 166A (which had Rule 56, Fed. R. Civ. P. as its source), and clearly was not a default judgment under Texas Rule 170 (source: Fed. Rule 37). The differences between a *summary judgment* and a *default judgment* are patent, and the State courts have summarily rejected — as we know this court will — petitioners' attempts to equate the two.

Mobil Oil Corporation and the respondents Athey and Hodgden each perfected separate appeals in order to seek reversal of the trial court summary judgment, with Mobil further seeking rendition of judgment, as between the Belveals and Mobil, denying all relief to the Belveals.

The Court of Civil Appeals, by unanimous opinion, reversed the plaintiffs' summary judgment and ordered:

(1) Remand for trial as between the Belveals, Athey and Hodgden;

(2) Remand for trial as between the Belveals and Mobil on Mobil's deeded property; and

(3) Rendition of judgment validating Mobil's oil and gas lease.

The partial remand and partial rendition by the Court of Civil Appeals was entirely proper. The case before that Court actually involved two separate and distinct causes of action asserted by the Belveals. The first, an action for (a) cancellation of seven 1962 deeds from the Belveals to Athey and (b) an accounting as to revenues derived from the property covered by the seven deeds, was set forth in plaintiffs' Original Petition, filed February 28, 1966 (Tr. 1-48), and was based upon the alleged fraud of Athey, Hodgden and Brim. The second, for (a) cancellation of a 1961 "Extension of Lease" agreement from Athey to Mobil, (b) declaration of the Belveal interests to be unleased for oil and gas purposes, and (c) an accounting as to revenues under the "Extension of Lease" agreement, was not asserted until the filing of plaintiffs' Second Amended Original Petition on August 23, 1966 (Tr. 126-148).

Mobil requested that the two cases be severed (Tr. 214), asserting that the two causes of action did not involve common issues of law or fact, and that the two did not arise from the same transaction or occurrence. The Belveals then filed their 391 page Fourth Amended Original Petition on January 25, 1967 (Tr. 580-971), claiming that the one element common to the two unrelated claims was the conspiratorial activity of J. K. Brim, a one-time Mobil employee;[3] and the court thereupon overruled Mobil's Motion to Sever (Tr. 1222).

[3] The first mention of any alleged conspiracy was in this Fourth Amended Original Petition of January, 1967.

The Court of Civil Appeals obviously agreed that the validity of Mobil's *lease* was established as a matter of law, but that trial on the merits was necessary on the *deeded land* controversy.

I SUBSTANTIVE DUE PROCESS WAS AFFORDED PETITIONERS

A. The State Court Correctly Validated Mobil's Leasehold Estate

1. The Record Facts

The developments, in chronological order, were as follows:

(a) On March 19, 1952, G. W. Athey, et al (the Belveals and others), lessors, executed and delivered to F. J. Ellyson, lessee, that certain oil, gas and minerals lease of such date, recorded in Volume 193, Page 368, Lease Records of Pecos County, Texas, covering Sections 44, 52 and 56, Block OW, T.T. Ry. Co. Survey, and Section 15, Block 48, Township 8, T&P Ry. Co. Survey, excepting the West 200 acres of the N/2 of said Section 15, all in Pecos County. (Ex. U, Fourth Petition, Tr. 598). The lease was assigned by Ellyson to Magnolia Petroleum Company, by assignment dated April 25, 1952, recorded in Volume 193, Page 378, Lease Records of Pecos County, Texas. (Ex. B, Mobil's Motion for Summary Judgment, Tr. 233.) Magnolia Petroleum Company was later merged into Socony Mobil Oil Company, Inc., and Mobil Oil Corporation has succeeded to the name and property of said Socony Mobil Oil Company, Inc. (Ex. C, Mobil's Motion for Summary Judgment, Tr. 235.)

(b) This lease has never been challenged by anyone—before or during this suit. Its validity is conceded. Delay rentals were paid to the Belveals, and the other lessors, and such payments were accepted by all lessors. (Affidavits of Carrington, Wright and Keller, Tr. 1159-1170; cf. with Fourth Petition, Tr. 580, where no claim of invalidity appears.)

(c) On August 22, 1960, the Belveals joined General Royalties Corporation and other persons and executed and delivered to Charles B. Athey a Power of Attorney, dated August 22, 1960, covering the above mentioned and referred to sections of land and also covering Section 18, Block 143, T. & St. L. RR Co. Survey, Pecos County, Texas. The Power of Attorney is of record in Volume 238, Page 65, Deed Records of Pecos County, Texas. (Ex. A, Fourth Petition, Tr. 634.)

(d) The validity of the Power of Attorney was not challenged by anyone — before or during this suit. To the contrary, the Belveals expressly plead and rely on the Power as being valid and subsisting at the times they claim were relevant to the suit. (Fourth Petition, par. 2p, Tr. 589-595.)

(e) On May 19, 1961, an instrument designated "Extension of Lease" was executed and delivered by Charles B. Athey, Individually and as Trustee and Attorney-in-Fact and Agent for Myrtle G. Belveal, et al., to Socony Mobil Oil Company, Inc., which instrument is recorded in Volume 292, Page 34, Lease Records, Pecos County, Texas, covering the same property described in the above

mentioned and referred to oil, gas and minerals lease. (Ex. L, Fourth Petition, Tr. 662.)

(f) For the execution and delivery to it of the "Extension of Lease," Mobil paid to Charles B. Athey and the other grantors and lessors the sum of $72,423.51, and said grantors received, accepted and retained such funds. (Affidavit of Wright, Tr. 1159; Fourth Petition, par. 27, Tr. 614.)

(g) After the extension, Mobil paid delay rentals to the Belveals' depository bank, which monies were received and retained by the Belveals. The delay rentals in 1962 were payable only under the extension agreement, not under the original lease. (Tr. 1164-1165.)

(h) During the year 1962, a well was commenced on Section 44, Block OW, for oil and gas and completed as a producing well in the early part of 1963. Other and additional wells have been drilled on the same lease premises since such time and completed as producing wells. In addition, a well has been commenced, drilled and completed on Section 18, Block 143. There has been continuous and uninterrupted operations for, and/or producing in paying quantities of, oil and/or gas to date on the lands under the terms and in accordance with the provisions of the above mentioned and referred to lease. (Affidavit of Wright, Tr. 1159.)

(i) The Belveals filed suit February 28, 1966, seeking to cancel certain deeds given by them to Athey, on the asserted ground of fraud by Athey, Brim and Hodgden. (First Petition, Tr. 2.)

(j) Not until Plaintiff's Second Amended Petition was filed on August 23, 1966, did the Belveals launch an attack on Mobil's producing lease, then attacking, for the first time, the Extension of Lease Agreement. (Tr. 266.) Fraud and conspiracy in the procurement of said Lease Extension was asserted for the first time when plaintiffs later filed their Fourth Amended Original Petition on January 25, 1967. (Tr. 580-1010.) The Belveals themselves assert that they learned of the fraud claimed by them in connection with the Extension of Lease Agreement in November, 1965. (Fourth Petition, par. 30a, Tr. 624.) During the interval of time from the Belveals' alleged discovery of fraud (November, 1965) until the Belveals first asserted a right of cancellation of Mobil's lease (August 23, 1966) and fraud and conspiracy in connection therewith (January 25, 1967), oil and gas were continually produced by Mobil, and Mobil received and disbursed funds attributable to this production from this lease. During this interval of time Mobil continually operated and developed the lease at tremendous expense. (Mobil's Second Motion for Summary Judgment, supported by affidavits, Tr. 1131; Mobil's Answer to Plaintiff's Motion, supported by affidavits, Tr. 1082.)

Mobil recognizes that:

(1) There is some evidence in this record tending to show that Athey, Brim and a lease broker named Hodgden reached agreement in the *spring of 1962* (at *least* eight months *after* the lease agreement was made) that

they would jointly acquire, in Athey's name, an undivided 1/7 fee interest owned by the Belveals. This Belveal interest was already under lease to Mobil when the agreement was made.

(2) There is evidence in this record that in *March, 1962* (ten months *after* the lease agreement) the Belveals executed seven deeds covering their interests, for which they received $105,000.00. The deeds were signed in blank, but when they were recorded, Athey appeared as grantee. This suit was commenced upon the Belveals' claim that they were defrauded in this *deed* transaction.

As explained before, the Belveals claim that the facts in this record compelled a plaintiff's summary judgment canceling Mobil's lease because:

1. The extension agreement was part of a Mobil-Athey conspiracy to defraud the Belveals, *or*

2. Athey was without legal authority to bind the Belveals in the execution of the agreement.

(Fourth Petition, par. 27, Tr. 614; Belveal Motion for Summary Judgment against Mobil, par. III, Tr. 1060-1064.)

In response to the Belveal claims, Mobil demonstrated to the Court of Civil Appeals that:

1. There is no competent evidence which suggests (much less establishes) any fraud or conspiracy on the part of Mobil, Brim, Athey, Hodgden, or anyone else in connection with the execution and delivery of the *extension agreement*. Further, estoppel bars any such claims. In any event, the claims of fraud came too late for consideration by the court.

2. Athey's authority to execute and deliver the May, 1961 agreement exists as a matter of law, because:

(a) Athey had authority to lease, and the agreement is a lease;

(b) Athey had authority to lease, and he had authority to amend the lease;

(c) Regardless of actual authority in Athey, the Belveals ratified the acts of Athey and are estopped and barred by laches from asserting any want of authority by reason of their acceptance and retention of benefits acquired by them under the agreement;

3. In any event, the claim for cancellation for want of authority to execute the instrument is barred by the statute of limitations.

The Court of Civil Appeals rendered judgment on the lease controversy on the basis of this outline.

2. Analysis Of The Facts And The Law

a. Fraud or Conspiracy

(1) *Where is the evidence?*

At the outset of this case in the trial court, we believed that no citation of authority was necessary to establish so basic a proposition as that which requires one who alleges fraud and conspiracy to prove frauds and conspiracy conclusively before he is entitled to summary judgment.

The Court of Civil Appeals has re-affirmed that such a showing *is* necessary, and that the Belveals wholly failed to prove by affidavits, depositions or otherwise that any

one conspired to defraud the Belveals in securing the *lease extension agreement.*

Not contenting ourselves with so declaring, let us point out the record evidence which militates against any finding of fraud in this 1961 transaction:

(1) Mobil paid $73,423.51 for the agreement. (Tr. 1159-1160.) There is not even a hint of proof that this price was inadequate. All of the Belveals deposed that they received, accepted and retained their part of this money consideration.

(2) Mobil still had over ten months remaining on the primary term of its lease when the extension was obtained. Mobil did not need the extension to preserve its lease — it could have begun drilling operations and held the lease. Indeed Mobil *would have* done so had Mobil not been able to reach agreement with the Belveals (Tr. 1166-1170).

(3) Surely if Mobil, Athey, Brim and Hodgden — or any of them — sought to defraud the Belveals in the 1961 extension transaction the Court could reasonably expect to find some ulterior motive. But there is none. Athey gained nothing by giving the agreement. Brim gained nothing under the agreement (and in this transaction he had no side deals) nor did Hodgden. Mobil gained nothing, save a two year lease for which it had to pay over $72,000.00.

(4) The Athey-Brim transactions which resulted in the passage of legal title by deeds from the Belveals to Athey occurred in March, 1962, over ten months *after* the extension agreement was delivered. Brim did not become personally involved with Athey and Hodgden until no earlier than January, February or March of 1962, more than eight months *after* the extension agreement was delivered. Even Brim admits that his agreement with Athey to acquire the

Belveal properties was not reached until the spring of 1962. Where, then, is there unlawful concert of action in May, 1961, when the extension agreement was delivered?

We know that the Court will read diligently this record to ascertain the validity of the El Paso Court's holding that there is a total absence of evidence raising any issue of fraud or conspiracy with respect to the May, 1961, "Extension of Lease" agreement. We know this Court will readily discern from proper affidavits and exhibits and from depositions, that *the only evidence in this record which might conceivably raise an issue of fraud has to do with the 1962 deeds from the Belveals to Athey*, that is, the deeds which resulted from transactions occurring in their entirety during the calendar year 1962. We are confident also that the Court will realize that Brim's questionable acts were all committed in 1962, after he embarked on a course of self-dealing in derogation of his duties to Mobil.

In the Court of Civil Appeals, Mobil challenged the Belveals to show that Court, by specific record reference, any competent evidence that there was fraud or unlawful conspiracy involved in the negotiation, signing or delivery of, or in the payment for, the May 19, 1961 Extension of Lease Agreement.

The challenge was not met. The Belveal briefs remained silent. For this reason, we believe, rendition of judgment followed.

(2) *Fraud or conspiracy; the claim comes too late.*

But let us suppose for the moment that the Belveals could prove fraud if this case were remanded; even if they could so prove, would they be entitled to judgment cancelling Mobil's lease?

The answer must be that the Belveal claim of fraud with reference to the May, 1961 extension agreement comes too late. There is no more strict rule in Texas than that holding delay as a complete bar to actions for cancellation, where cancellation of an oil and gas lease is sought.

As we discuss the Belveal delay, we ask the Court to recall that the Belveals themselves allege they knew *all* of the facts they say prove fraud in November, 1965. (Tr. 624.) An action for cancellation of Mobil's lease was first asserted on August 23, 1966. (Tr. 266, 321.) The *admitted* delay is at least ten months or longer, without any inquiry as to whether the Belveals *should have* discovered the problem earlier.

This long delay is fatal to the Belveal case.

Texas courts have never condoned inaction such as is present here—when the result of the inaction is to allow a prospective litigant to speculate on the fluctuations in value of an oil and gas lease. Texas law condemns a delay of *two months* between the discovery of fraud and the inception of the action to cancel, it having been held that a two months' delay is an absolute bar to an action for cancellation because of fraud. We speak, of course, of *Minchew v. Morris*, 241 S.W. 215 (Tex. Civ. App.).

In the *Minchew* case, Morris bought an oil and gas lease from Minchew on January 16. In the negotiations Minchew made certain representations which induced Morris to buy. During February — one month later — Morris learned that Minchew had defrauded him, that the lease was not as represented. During February and March, Morris and Minchew corresponded and talked, but finally on April 16 (three months after the purchase, two months after the discovery of fraud) Morris was told that Minchew would not voluntarily rescind the purchase. Morris then took action.

On trial of Morris' fraud case against Minchew in which he sought cancellation of a note given to Minchew, rescission of the lease purchase and restoration of the parties to the status quo, Morris obtained the trial court judgment. The Court of Civil Appeals *reversed and rendered* solely because of Morris' *delay* in seeking cancellation and rescission. We quote at some length from the opinion by Judge Hamilton:

> "The most serious matter presented in this appeal is the question of laches invoked as a defense by appellant. We take it as well established that the doctrine of laches is to be applied with unusual strictness and severity to contracts relating to the sale of oil leases against the person seeking rescission. This is because of the uncertain and fluctuating value of property of this nature. Experience and observation teach that an oil lease may be worth thousands of dollars today and tomorrow may be deemed as worthless, and that, on the other hand, a lease which may be of little value at a given time within a short period

may be transformed into one of fabulous value because of operations on adjacent and surrounding territory which develop oil wells and establish such lease as proven territory.

"Such being the facts, generally stated, we believe that as applied to a transaction of the nature involved in this suit, relating to a business in which the element of time is of higher importance than in any other business, it is fairly established that appellees' negligence and omission to act promptly upon discovering the asserted fraud rendered their conduct vulnerable to the plea of estoppel by laches. In our opinion the most indulgent consideration of the evidence discloses it to be insufficient to establish a right of rescission in the face of the facts sustaining this plea.

"Rescission, to be available, must be sought with promptness and diligence in any case; but what constitutes promptness depends upon all the facts and circumstances of each particular case. In trades involving property the value of which is fixed and free from fluctuation, the lapse of a comparatively long period of time after the discovery of the fraud may not afford any basis for the plea of estoppel by laches. In fact, the mere running of time is not of itself a determinative element of laches as it is of the legal defense of limitation. Laches is to be distinguished as consisting of negligence or omission to do, whenever it ought to be done, what the law requires to be done to protect a right which is presumed to have been abandoned because of such neglect or omission. Black on Rescission, § 541. But, while the law imposes the requirement of reasonable promptness in all cases to avoid laches, it requires greater diligence and activity in seeking to rescind transactions with reference to oil values affected by extraordinary uncertainty and fluctuation, as they are, than with reference to ordinary dealings. Twin Lick Oil Co. v. Marbury, 91 U.S. 592, 23 L. Ed. 328."

The strictness of the *Minchew* holding has not been relaxed in oil and gas lease cases. In *Murphy v. Johnson*, 54 S.W. 2d 158 (Tex. Civ. App.), it is held:

> "The rule by which laches and negligence delay in bringing a suit is measured is largely determined by the exigencies of the situation of the parties and the nature and character of the property furnishing the subject matter of the suit. It is a matter of common knowledge, which courts have universally recognized, that in dealing with oil and gas property it requires large expenditure of money to discover and reduce same to possession. Such property is also fugitive in its nature and subject to drainage under the laws of gravity, and also to great fluctuation in its value. Or as was said in the case of Twin-Lick Oil Co. v. Marbury, 91 U.S. 587, 592, 23 L. Ed. 328:
>
> > " 'The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which would today sell for a thousand dollars as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.
> >
> > " 'While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent, and violent fluctuations

> in value of any thing known as property, requires prompt action in all who hold an option, whether they will share its risks, or stand clear of them.'
>
> "And, in the language of the courts, the principle of laches is applied with greater force when the matter relates to oil and gas property and to minerals — the substance of which is fugacious, and the diligence required is measured by months rather than years, each case depending on its own particular facts and circumstances. Patterson v. Hewitt, 195 U.S. 309, 25 S. Ct. 35, 49 L. Ed. 214; Atlantic Life Ins. Co. v. Rowland (C.C.A.), 22 F. 2d 126; Dexter & Carpenter v. Houston (C.C.A.) 20 F. 2d 647; Galliher v. Cadwell, 145 U.S. 368, 12 S. Ct. 873, 36 L. Ed. 738; General Electric Co. v. Yost Electric Mfg. Co. (D.C.) 208 F. 719; Henry et al. v. United States (C.C.A.) 46 F. 2d 640; Minchew v. Morris (Tex. Civ. App.) 241 S.W. 215.
>
> "Appellants sat by and permitted the oil companies to expend large sums of money in developing and making the oil and gas property valuable; they therefore come clearly within the rule announced in the case of General Electric Co. v. Yost Electric Co., supra, to the effect that a comparatively short time may constitute laches when the conduct of the slothful is such as to induce others in good faith to expend money and take the risks of the enterprise."

Significant indeed is the Murphy reminder that a fortune can be spent on a lease while the negligent sleeps on his rights when we recall that:

> "* * * in the years following May 19, 1961, Mobil has expended millions of dollars in development and operations, including vast amounts of money in installing a recycling facility for the Coyanosa Wolfcamp Reservoir."

(Affidavit of Mobil Division Exploration Manager, K. F. Keller, Tr. 1166-1169.)

What justice lies in allowing the Belveals to stand by—possessed of knowledge that they say creates a right of cancellation of Mobil's lease—while Mobil expends millions to prove up that lease and develop it? The Belveals speculated on Mobil's money as they stood silent; if the lease went bad, no risk taken. Ah, but if the lease went well, then come the Belveals to claim all that Mobil had accomplished. The law will not permit such conduct. In *Holmes v. Cummings*, 71 F. 2d 364, in a Texas case very similar to our own, the Court of Appeals for the Fifth Circuit, through Judge Hutcheson, held:

> "Upon the plainest principles, it is obligatory on one having a right for fraud to rescind to promptly disaffirm upon discovery of it. If, with knowledge of the facts which give him the right to rescind, he does not promptly proceed to do so, though he may still sue at law for fraud, his right to rescind is lost. Especially is that so where, as here, the property involved is of a speculative nature, and with full knowledge of the facts plaintiff has waited, under changing conditions, to disaffirm. Restatement, Contracts, § 483. The delay here was unreasonable. *Though plaintiff knew* shortly after it came in of the Strake discovery well, and *in a general way* of subsequent developments in that vicinity, and though they were, as Holmes testified, dissatisfied with their trade, *they waited for many months to sue.*"

The delay from time of discovery of fraud until suit was filed in the *Holmes* case was from August 19, 1931 to October 8, 1932. This delay of *thirteen months and two*

weeks barred the plaintiff's right of action. In our case the Belveals delayed at least from November, 1965 until August 23, 1966 to bring suit: over one year before alleging fraud and conspiracy; and a delay almost exactly equivalent to that under discussion in the *Holmes* case.

The Court of Civil Appeals, by unanimous opinion, concluded that this record establishes Mobil's right to judgment on the Belveal claims of fraud in the 1961 lease agreement. There is no evidence of fraud, there is conclusive proof of unreasonable delay. By reason of such laches, the Belveals should be and they are now estopped to assert any such cause of action.

b. *Athey's Authority to Give Mobil a Lease*

(1) *Athey's Specific Authority.*

Athey delivered to Mobil, for $72,000.00 paid to the Lessors, the extension agreement; Athey's execution and delivery occurred under a written and recorded Power of Attorney, signed and acknowledged by each of the Belveals who are now parties to this suit. (See Fourth Petition, par. 2p, Tr. 591-594.)

The Power of Attorney was *executed in August, 1960,* over nine months *before* the extension agreement, over seventeen months *before* Athey, Hodgden and Brim entered into their arrangements, and over nineteen months *before* deeds passed from the Belveals to Athey.

This Power, by its express terms, binds the Belveals to an appointment of Athey as

> "* * * our true and lawful attorney for us and in our names, place and stead * * * to make, acknowledge, execute and deliver oil, gas and/or other mineral leases * * * for such consideration and upon such terms and conditions as he alone shall determine * * *"

The validity of this Power of Attorney is not questioned by the Belveals. *To the contrary, the Power is expressly pleaded and expressly relied upon by the Belveals in this suit.* It forms the basis for the Belveals' claim of a fiduciary relationship on the part of Athey. (Fourth Petition, par. 2p, 2q, Tr. 591-596.)

As the holder of the express Power, Athey had the right to give—and Mobil had the right to take—a binding oil and gas lease on lands covered by the Power. *Baxter v. Yarborough*, 46 Tex. 231; *Link v. Page*, 72 Tex. 592, 10 S.W. 699; *Pool v. Unknown Heirs of Foster*, 49 S.W. 923 (Tex. Civ. App.).

The so-called "Lease Extension" agreement is in law and in fact a binding oil and gas lease. In it are all essential elements: it is in writing, it is signed by one with authority to sign, it was delivered. It contains specific words of grant:

> "* * * the undersigned do hereby lease, let and grant unto the lessee * * * its successors and assigns, the above described land under all of the terms and provisions of said lease * * *"

It sufficiently identifies the property leased; it leaves no uncertainty as to the rights and obligations, respectively of lessor and lessee, for by specific reference to a recorded instrument it incorporates drilling, rental and surrender clauses, and a habendum clause. It is supported by adequate consideration. *The agreement of May 19, 1961, is an oil and gas lease.* See Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 7 *Texas Law Review*, 111 et seq. 555-562; *Stephens County v. Mid-Kansas Oil & Gas Co.*, 254 S.W. 290 (Tex. S. Ct., 1923); *Hager v. Stakes*, 294 S.W. 835 (Tex. S. Ct., 1927); see also Vol. II, *Summers on Oil and Gas*, ch. 9, 10 and 11, pp. 2-482, for a full discussion of "Validity of Oil and Gas Leases."

No one—not even the Belveals—contends that Athey did not hold a valid Power of Attorney in May, 1961, granting him the express power to execute and deliver an oil and gas lease covering the Belveal property. The Belveals refuse to admit that Athey *exercised* that power in the giving of the extension agreement, earning for the Belveals their part of a bonus consideration of some $72,000.00 and subsequent delay rental payments. Certainly the Power given Athey was broad enough to include the execution of the "Extension of Lease" agreement.

Confident though we be that Athey had the power to execute the 1961 extension agreement and that the in-

strument was itself a "lease" within the powers granted Athey, there are yet other compelling reasons why the Court of Civil Appeals held the Belveals to be barred from successfully claiming a want of authority in their Attorney-in-Fact. These bars are estoppel, ratification, and the statutes of limitation.

(2) *Estoppel and Ratification.*

When the 1961 instrument was delivered to Mobil, Mobil paid $72,423.51 in consideration for it. (Tr. 1159-1160.) The Belveals admit in their pleadings that they received and accepted this money, and that it was retained and used by them until a tender of return was set forth in their *Third Petition* filed December 26, 1966, as follows:

> "* * * plaintiffs *here and now* tender all of the money and consideration *heretofore* received by the plaintiffs back to * * * Mobil * * *"

(Third Petition, par. 27, Tr. 615.)

Of equal significance, *Mobil paid delay rentals under the extended lease*—for the period from March 19, 1962, to March 19, 1963—*to the depository bank selected by the Belveals, for the respective account of each plaintiff in this suit.* The delay rentals were deposited in the bank in February, 1962. These delay rentals were not payable under the original ten year term of the 1952 lease, but were payable only under the lease agreement of May, 1961. (Tr. 1164-1165.)

The Belveals, by judicial admission, acknowledge that they received and accepted these delay rentals, and that they retained and used these funds, pleading as follows:

> "* * * plaintiffs here tender and are willing for the defendants and each of them to recover any monies or benefits *accepted under the terms of said lease* by plaintiffs * * *"

(Third Petition, par. 27, Tr. 615, filed December 29, 1966.)

We ask the Court to bear in mind that the Belveals admit they gained full knowledge of all circumstances surrounding the 1961 lease agreement in November, 1965 (Fourth Petition, par. 30a, Tr. 624), but that the Belveals retained all benefits accepted by them under the agreement for over one year after gaining such knowledge before tendering the return of such funds.

These facts clearly impel a holding that the Belveals are now estopped from asserting any defect in the very instrument under which they, or their predecessors in title, accepted benefits.

In *Bearden v. Texas Co.*, 41 S.W. 2d 477, aff'd. 60 S.W. 2d 1031 (Tex. Comm. App.), it is held:

> "* * * the defense of estoppel as against Bessie Lee Griffin was conclusively established by her act in recovering from her former guardian on final settlement * * * several thousand dollars collected by him as royalties from the lease which was assailed by her; and further receipts of royalties * * * amounting to more than $1,000, since such acts conclusively bound her to a ratification of the lease * * *"

In *Texas Co. v. McMillan*, 13 F. Supp. 407, Judge Atwell held, in applying Texas law:

> "The McMillians * * * received payment from the Complainant (The Texas Co.) upon such portion of the lands as were developed. Such acquisition and acceptance of benefits by them from the complainant places them in the attitude of having recognized, confirmed, and ratified the title of complainant, and they are estopped to deny its estate * * * A person certainly cannot be permitted to claim both under and against the same deed."

In *Leopard v. Stanolind Oil Co.*, 220 S.W. 2d 259 (Tex. Civ. App. 1949, er. ref., n.r.e.), estoppel was held to exist as a matter of law where one questioning a lease was shown to have accepted and cashed royalty checks. In *Buchanan v. Sinclair Oil & Gas Co.*, 218 F. 2d 436 (5th Cir., Tex. 1955), it was held that acceptance and retention of delay rentals estopped the lessor from denying the validity of an oil and gas lease. In *Mitchell v. Simms*, 63 S.W. 2d 371 (Tex. Comm. App. 1933), a lessor was estopped from claiming that the lease was not in force when he had accepted delay rentals. In *Myers v. Crenshaw*, 116 S.W. 2d 1125 (Tex. Civ. App., 1938), *McCoy v. Texon Royalty Co.*, 124 S.W. 2d 877 (Tex. Civ. App., 1939, err. dis., judg. conf.), *Humble Oil & Refining Co. v. Harrison*, 205 S.W. 2d 355 (Tex. S. Ct. 1949), *Gulf Production Co. v. Continental Oil Co.*, 164 S.W. 2d 488 (Tex. S. Ct. 1942), and in *Ball v. Yowell*, 222 S.W. 2d 277 (Tex. Civ. App. 1949, er. ref., n.r.e.), it was uniformly and consistently held that *acceptance of benefits (delay rentals) under a lease absolutely precludes an attack on the lease.*

The acceptance by the Belveals of benefits under the May, 1961 lease agreement was not accidental, nor can the Belveals claim they did not know what the money was for. Marion J. Belveal, the agent for the family in handling the Pecos County property here involved, has admitted in his deposition:

"Q. * * * you had received some money, had you not, you and your brothers and sisters, from a renewal of an oil and gas lease?

"A. Oh, yes, we had received renewal payments and bonus payments * * *

"Q. Had (they) not executed an extension of lease agreement with Socony Mobil for which you and your brothers and sisters had received in the aggregate, it seems to me, it was a rather large sum of money?

"A. Well we received a rather large sum of money on a renewal, but I don't recall the dates on it." (Belveal deposition, Vol. I, p. 38-39.)

"Q. But now in May of 1961 or June of 1961, you and some of the family did receive compensation for an extension of this lease held by Mobil, did you not?

"A. The date, the month, the time, I can't say, but we have received an extension from some oil company. I believe the sheet that Chuck sent me would show who it was leased to.

"Q. Don't you remember it being Mobil?

"A. Not that specific instance, no sir.

"Q. Well, what other instance, you say not that specific instance?

"A. Well, I mean that he sent us information that he was leasing and re-leasing or extending whatever

it might have been with Mobil Oil Company and I believe Tidewater Oil Company was another one, and if there was another one, I don't recall it.

"Q. In any event, at the time that you were trading in these properties, you knew that Mobil had a lease on some or part of them, or some interest in some of them?

"A. Sometime during the entire interval between the time that we discovered that we did have these properties and the time we sold, yes sir, I knew that Mobil had a lease on it.

"Q. And at that time and in May or June 1961, when the extension of the lease was made, you took the money that come to you for signing that extension, didn't you?

"A. Took the money that was sent to me, yes sir.

"Q. And you spent it?

"A. Since I do not have a large amount of money on hand, I would say that I spent it — yes sir.

"Q. You used it for what you wanted?

"A. Yes sir." (Belveal deposition, Vol. II, pp. 17-19.)

"Q. And what amount of money did you receive for any extension that you now remember?

"A. Well, it was for an extension or a renewal or a bonus lease, I don't have the least idea.

"Q. I said, what sum of money was it that you received?

"A. I couldn't quote the sum.

"Q. Do you recall having received from Mr. Athey a sum of money that represented the Belveal part

of a seventy-odd thousand dollar amount that had been paid by Mobil for an extension of a lease?

"A. Well now, that $70,000.00 doesn't ring a bell at all.

"Q. Well, now, that is for all, not for Belveals' part.

"A. No, what would be the Belveals part in that?

"Q. Ten Thousand some odd approximately.

"A. I don't recall ever receiving a check for $10,000.00.

"Q. Well, how about $9,000.00?

"A. Yes, $9,000.00 and something rings a bell.

"Q. Well, do you now, that figure nine thousand having been, having rung a bell, do you remember the purpose for which you believed that sum had been received?

"A. That particular sum, I believe, was for a renewal or for a bonus lease. The beginning, now how long it extended for, I don't know.

"Q. For a new lease?

"A. Yes.

"Q. Well, you did receive some information about what that nine thousand odd dollars was for, did you not?

"A. I believe it was on the check.

"Q. In April 7th, in 1962, you knew that you received nine thousand odd dollars for the Belveal interests in an oil and gas lease. You knew, at that time?

"A. Yes, sir." (Belveal deposition, Vol. I, pp. 106-109.)

Marion Belveal, the administrator of the Belveal family property in Pecos County, was not alone in his understanding and acceptance of benefits under the May, 1961 lease agreement. Mrs. Golda Branom, one of the parties to this suit, and older sister of Marion Belveal, has testified:

> "Q. In 1962 now, when you signed — or I will say in 1960, when you signed this on August 22, 1960, this instrument, did you know at that time that Mr. George Athey, in his lifetime, had in 1952 had executed an oil and gas lease in favor of a lessee covering the land in Pecos County, Texas, that are involved in the suit that you have filed No. 3583 in the 83rd District Court of Pecos County, Texas?
>
> "A. Well I must have.
>
> "Q. And as a matter of fact, you had received, had you not, over the years your proportion and part of delay rental that would be due under that lease?
>
> "A. I am sure we did now.
>
> "Q. And as a matter of fact you had been reared, had you not, in an oil field community and you knew about oil and gas leases and delay rentals and those kind of provisions that appear it —
>
> "A. Oh, sort of.
>
> "Q. And you had been the beneficiary of those under this lease and others that your father and then you had executed?
>
> "A. Yes.
>
> "Q. And then we both know the term of delay rental was not a strange word to you, you knew what that was?
>
> "A. Yes sir.

"Q. And you knew about a bonus for oil and gas leases?

"A. Yes.

"Q. And as a matter of fact you had a general speaking knowledge of oil and gas leases and oil and gas terms all of your life now, have you not, all of your adult life?

"A. Yes sir, sort of.

"Q. And then do you — but you do know that you had received your part and proportion of delay rentals that had been paid under this lease that Mr. George Athey executed during his lifetime?

"A. Yes sir.

"Q. Well, did you receive your proportion and part, did you not, for the bonus or consideration that was paid for the execution of that two year instrument?

"A. I'm sure I was, because we were paid —

"Q. The Belveal interest in these sections was an undivided 1/7th part, was it not, you knew that, did you not?

"A. Yes.

"Q. And the other 1/7ths part were owned you knew, did you not, by others of the families in Enid?

"A. Yes.

"Q. And they had been bought, those particular sections, had been bought by your father, Mr. Charles B. Athey's grandfather, and other of the Enid residents some time before the '30's, under your understanding?

"A. Yes sir.

"Q. And you knew it was a family owned thing?

"A. Yes sir.

"Q. Now I believe it has been suggested in this record that at the time that this two year lease was executed in Socony's favor, Socony Mobil's favor that there was a Seventy some odd Thousand Dollar ($70,000.00) consideration paid for it, not for the Belveals alone but that the Belveal part was a part between Nine (9) and Ten (10) Thousand Dollars. Do you remember a distribution being made to you by your brothers of your proportion and part of a Nine (9) or Ten (10) Thousand Dollars, that was paid for that lease?

"A. I'm sure of it." (Belveal deposition, Vol. II, pp. 70-74.)

"Q. And you were then in about 1961, the Belveals received some Nine or Ten Thousand Dollars ($9,000.00 or $10,000.00) for extension of this lease, covering the Pecos County, Texas properties, did you not?

"A. Yes sir.

"Q. And you took your share of the money?

"A. Yes sir.

"Q. And you spent it the way you wanted to?

"A. I did.

"Q. No complaint with the lease owner or operator, Mobil, that I represent?

"A. Not that I know of.

"Q. And you didn't complain to Mobil, you just took their money and spent it and gave them the extension of the lease, didn't you?

"A. That's right." (Belveal deposition, Vol. II, pp. 128-129.)

The estoppel which operates in this case simply denies to the Belveals their claim that Athey was without authority to extend Mobil's leasehold estate. The Belveals accepted benefits under the agreement to extend, with knowledge of what they were doing, and have retained those benefits from May, 1961 right up until this good day. *They have never repaid what they took under the agreement and spent for their own purposes.*

Of particular application here are cases such as *Doty v. Barnard*, 47 S.W. 712, where the Supreme Court declared:

> "'The doctrine of election is founded upon the principle that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all of its provisions and renouncing every right inconsistent with them. The principle is recognized and established in this country almost precisely the same as in England, and rests upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who claims an interest under an instrument is bound to give full effect to that instrument as far as he can. *A person cannot accept and reject the same instrument, or having availed himself of it as to part, defeat its provisions in any other part; and this applies to deeds, wills, and all other instruments whatsoever.*"

In addition to receiving and accepting and retaining the bonus payments for the 1961 agreement, the Belveals received, accepted and retained delay rentals payable to them only because of the 1961 agreement. They are estopped to deny the continuing effect of such agreement in whole and in all of its parts.

This is the holding of the Supreme Court in *Loeffler v. King*, 236 S.W. 2d 772, and the many cases thereafter following and citing it. See, e.g., *Lowe v. Ragland*, 297 S.W. 2d 668 (S. Ct.); *Texas & Pacific Coal & Oil Co. v. Kirtley*, 288 S.W. 619 (Tex. Civ. App., err. ref'd.).

Cases such as *Doty v. Barnard* and *Loeffler v. King* establish the universal rule that one may not accept benefits under an instrument and then later attempt to repudiate any part of it. *This rule is also applied to cases such as our own where a principal (the Belveals) accepts money under an instrument of title (the 1966 lease extension) executed by an agent (Athey) in his representative capacity (the 1960 Power of Attorney) and then later seeks to deny the estate granted by the agent (Mobil's lease).*

In 1910 the Supreme Court of Texas foreclosed just such denials of agency as the Belveals now seek to assert. In *Horst v. Lightfoot*, 132 S.W. 761 (1910), L. G. Clepper had a Power of Attorney from George Resley, under which Clepper could sell Resley's lands *for cash, if over $1.00 per acre was obtained.* Under the Power of Attorney and as agent, Clepper conveyed some of Resley's land to Mitchell. This sale was for less than $1.00 per acre, and the sale was made for part cash, part credit.

It is clear, of course, that the Clepper conveyance was without authority and did not pass title. However, the

Supreme Court upheld the validity of the deed, specifically holding that it did pass title. The reason? The court said:

> "All that was necessary to a ratification was that the proceeds of the sale should have been paid to Resley by Clepper and retained by the former." (132 S.W. at 763.)

From this case we know that even if an agent exceeds his powers under a written Power of Attorney in executing a conveyance (the precise Belveal claim here), the principal may not deny the estate granted if he has accepted and retained the consideration given for the conveyance.

Horst v. Lightfood, supra, is but the first in an unbroken line of authority. In *Oberholtzer v. Myles*, 147 S.W. 2d 569 (Tex. Civ. App. 1941, err. dis'd., judg. corr.), Pitman was agent for Conder in arranging a sale of a royalty interest. Conder left a signed deed with Pitman with instructions to hold the deed until Conder gave authorization to deliver it. Pitman undertook to make a sale of Conder's property to Oberholtzer, *through fraud and conspiracy* Conder alleged, and Pitman delivered the deed to Oberholtzer. Oberholtzer's payment for the royalty interest was sent to Conder on April 26, 1937. Conder "retained the consideration and used and appropriated it." Conder filed suit on May 14, 1938 *(thirteen months* after Conder had full knowledge of the transaction, as compared with the Belveals' delay of at least *ten months* in our case). The Amarillo court held:

> "This conveyance was not void and appellees could estop themselves by ratification. W. H. Threadgill et al. v. Butler, 60 Tex. 599; Fennimore v. Ingham

et al., Tex. Civ. App., 181 S.W. 513; Gray v. Fenimore, Tex. Com. App., 215 S.W. 956; Burke-Mobray et al. v. Ellis et al., 44 Tex. Civ. App. 21, 97 S.W. 321; Schleicher et al. v. Runge et al., Tex. Civ. App., 37 S.W. 982; Dallas Joint Stock Land Bank of Dallas v. Burck et al., Tex. Civ. App., 102 S.W. 2d 1074.

"A grantor may on the general principles of ratification by his words, acts and conduct estop himself from denying the delivery of, or from attacking the validity of a deed. 14 Tex. Jur. 827, para. 64.

In 2 Tex. Jur. 487, para. 89, the author says: '*The principle is well established that, if one without authority assumes to act as agent, or if an agent exceeds his proper authority, the principal knowingly receiving and retaining the benefit of the transaction will be held liable. This principle is founded on estoppel.*'

"In American Jurisprudence, Vol. 2, page 181, para. 227, the law is stated thus: 'It is an established principle of law that where a person acts for another who accepts or retains the benefits or proceeds of his efforts with knowledge of the material facts surrounding the transaction, the latter must be deemed to have ratified the methods employed, as he may not, even though innocent, receive or retain the benefits and at the same time disclaim responsibility for the measures by which they were acquired.'

"In Horst et al. v. Lightfoot et al., 193 Tex. 643, 132 S.W. 761, 763, Justice Williams, speaking for the Supreme Court relative to the ratification by the principal of the unauthorized act of an agent in connection with the consideration accepted for land, says: 'All that was necessary to a ratification was that the proceeds of the sale should have been paid to Resley by Clepper according to his duty and retained by the former. If he received only the money paid in cash and kept it, he must have known that

the sale was made partly on credit and have elected to abide by it; and the same conclusion would result, for a stronger reason, from the receipt and retention of both the cash and the credit payments or of any obligation taken or the latter.'

"See also Harrison et al. v. McMurray et al., 71 Tex. 122, 8 S.W. 612; Vogel et ux v. Zipp et al., Tex. Civ. App., 90 S.W. 2d 668; W. R. Miller & Co. v. Hobdy et al., Tex. Civ. App., 159 S.W. 96; Burke-Mobray et al. v. Ellis et al., supra.

"The judgment is reversed and here rendered that appellant, R. V. Oberholtzer, recover of and from the appellees title and possession to an undivided one-half interest in and to the oil, gas and minerals on Section 36-B in Block AX, Public School Land, containing 388 acres, situated in Yoakum County, Texas."

No case better illustrates the uniformity of the Texas cases on this point than *Condor Petroleum Co. v. Greene*, 164 S.W. 2d 713 (Tex. Civ. App., 1942, err, ref'd., w.o.m.). The court held:

"Under all the authorities a principal who, with knowledge of the material facts, retains the benefits of a contract made in his behalf by an unauthorized agent cannot repudiate that part of the contract which is unsatisfactory to him. Having knowledge of the facts and retaining the benefits, he is considered as having ratified the contract in its entirety, and is so bound. 2 C.J.S., Agency, § 49, p. 1097, and 1104; 5 Am. Jur. 320; Braxton v. Haney, Tex. Civ. App., 82 S.W. 2d 984 writ refused; State Life Ins. Co. v. Duke, Tex. Civ. App., 69 S.W. 2d 791, writ refused; Williams v. Nolan, 58 Tex. 708, 712; Nason v. Addison County Trust Co., 104 Vt. 183, 157 A. 821; Oklahoma Title Co. v. Burrus, 172 Okl. 94, 44 P. 2d 852; Republic of China v. Merchants' Fire Assur. Corp., 9 Cir., 49 F. 2d 862, 865; Ferinac v. Italian Importing Co.,

Iowa, 179 N.W. 823, 824; McGinley v. Marylans Cas. Co., 85 Mont. 1, 277 P. 414, 417, 72 A.L.R. 1; National Surety Co. v. Jackson County Bank, 4 Cir., 20 F. 2d 644, 646; Waggoner v. Western Carolina Pub. Co., 190 N.C. 829, 130 S.E. 609; Kelley v. Isensee, 60 N.D. 149, 233 N.W. 245; Wm. Cameron & Co. v. Gibson, Tex. Civ. App., 278 S.W. 522, writ refused; Roller v. Wooldridge, 46 Tex. 485, 495; Ellis v. Simmons, 5 Cir., 11 F. 2d 596; Armour Fertilizer Works v. Maddox, 168 Ga. 429, 148 S.E. 152; Wilkins v. Waldo Lumber Co., 130 Me. 5, 153 A. 191; Miller v. Chatsworth Sav. Bank, 203 Iowa 411, 212 N.W. 722; Maryland Cas. Co. v. Beebe, 10 Cir., 54 F. 2d 743; Horst v. Lightfoot, 103 Tex. 643, 648, 132 S.W. 761; Scott v. Lott, Tex. Civ. App., 247 S.W. 685; New Amsterdam Cas. Co. v. Harrington, Tex. Civ. App., 11 S.W. 2d 533, 539; Murchison v. Davis, Tex. Civ. App., 4 S.W. 2d 1016, 1018; Lynch Davidson & Co. v. Denman Lumber Co., Tex. Civ. App., 272 S.W. 803; Jason Weiler & Sons v. Haskell Nat. Bank, Tex. Civ. App., 13 S.W. 2d 384; Grayburg Oil Co. v. Powell, 118 Tex. 354, 26 S.W. 2d 333; Owen v. King, Tex. Civ. App., 84 S.W. 2d 743, reversed on other grounds 130 Tex. 614, 111 S.W. 2d 695, 114 A.L.R. 859; Texas P.C. & O. Co. v. Smith, Tex. Civ. App.,) 30 S.W. 2d 425. Also see State Life Ins. Co. v. Duke, Tex. Civ. App., 69 S.W. 2d 791, writ refused; Dunlap v. Villareal, Tex. Civ. App., 91 S.W. 2d 1124; Kreis v. Kreis, Tex. Civ. App., 54 S.W. 2d 1107; 2 Tex. Jur. 487."

Every element of estoppel is present in this case to prevent the Belveals from asserting that Athey was not empowered to execute and deliver the May 19, 1961 extension agreement. Every element of estoppel is established as a matter of law. The Belveals have judicially admitted — by pleading and deposition — the acceptance by them of monetary benefits under the agreement they

now attack. The Belveals admit they took and used this money, that the funds were retained. Having thus ratified the agreement, the Belveals are, as correctly held by the Court of Civil Appeals, estopped to deny Mobil's leasehold granted in the agreement.

(3) *The Statute of Limitations*

As already specifically set forth, this action for cancellation of the instrument creating an oil and gas leasehold estate (the May, 1961 extension agreement) was not filed until August 23, 1966 — five years after the delivery — for value — of the agreement.

As already set forth, the Belveals received and accepted payments under the agreement in 1961 and in 1962 — and they have admitted in deposition testimony that when the money was received *they knew of the extension agreement.*

We have explained that the Belveal plea for cancellation of the 1961 agreement is two-fold:

1. The instrument was secured through fraud and conspiracy; *or*

2. Athey was without authority to extend the Mobil lease.

Earlier in this brief we have taken a detailed look at the claim of fraud and shown where there is no evidence to support it. In conjunction with our answer to the claim of fraud we showed that even if fraud and conspiracy is presumed (which the trial court must have done), then even so the Belveals have no standing to assert a cancel-

lation because of the doctrine of *laches*. It was there we pointed out cases such as *Minchew v. Morris*,[4] where a delay of *two months* was held to bar a suit for cancellation.

Turning now to the Belveal claim for cancellation because of lack of authority in Athey, we assert that this claim is barred by the statute of limitation.

In discussing this area of the case we must make crystal clear that the Belveal claim, relative to claimed lack of authority of Athey, is a claim that the 1960 Power of Attorney signed by the Belveals was not broad enough to include a power of extension. (See Fourth Petition, par. 27, Tr. 614-615.) Without getting involved in any quarrel about this claim, as such, let us draw the Court's attention to the fact that *whatever powers were given to Athey in the 1960 Power of Attorney, the Belveals knew what those powers were.* They cannot deny knowledge of the instrument they signed and acknowledged, and upon which they specifically rely in this suit.

We ask the Court to add to the fact that the Belveals had knowledge of the Power the fact that in 1961 the Belveals knew of a lease extension agreement on their Pecos County property (Belveal deposition, Vol. I, pp. 38-39, 108-109; Vol. II, pp. 17-19, 70-74, 128-129).

If the Belveals are now correct in saying that Athey exceeded his Power of Attorney in giving the 1961 lease extension, then we say that suit should have been filed to

[4] *Minchew v. Morris*, 241 S.W. 215.

cancel the extension agreement within four years after May 19, 1961.

Suits for cancellation of instruments are subject to the statutes of limitation. *Cooper v. Lee*, 12 S.W. 483 (Tex. S. Ct.); *Deaton v. Rush*, 252 S.W. 1025 (Tex. S. Ct.); *Gareis v. Gordon*, 243 S.W. 2d 259 (Tex Civ. App.); *Finney v. Finney*, 164 S.W. 2d 263 (Tex. Civ. App., err. ref'd., w.o.m.)

A suit for cancellation of an instrument of title is subject to *Art. 5529, Tex. Rev. Civ. Stat.*, providing a limitation period of four years following accural of the cause of action. *Fitchett v. Bustamente*, 329 S.W. 2d 920 (Tex. Civ. App., err. ref'd., n.r.e.); *McMullen Oil & Royalty Co. v. Lyssy*, 353 S.W. 2d 311 (Tex. Civ. App.); *McMullen Oil & Royalty Co. v. Korzekwa*, 344 S.W. 2d 525 (Tex. Civ. App., err. ref'd., n.r.e.); *Cartwright v. Minton*, 318 S.W. 2d 449 (Tex. Civ. App., err. ref'd., n.r.e.); *Deaton v. Rush*, 252 S.W. 1025 (Tex S. Ct.).

If Athey executed a conveyance not authorized by the Belveals, a cause of action for cancellation accrued when the Belveals learned of the conveyance. *This was in 1961.* The filing of suit on August 23, 1966 is barred by *Art. 5529.*

3. *Conclusion — Mobil's Leasehold Estate*

Every equity demanded the restoration to Mobil of its oil and gas lease by the Court of Civil Appeals. Mobil bought that estate in good faith and paid value for it. Mobil dealt with the agent appointed by the Belveals and

relied upon his authority under the Power of Attorney placed on record by the Belveals.

No fraud was practiced by anyone — not by Mobil, not by Brim, not by Athey — in the giving of the May 19, 1961 agreement under which Mobil holds. There is not one word of competent deposition testimony, not one exhibit, not one affidavit, that raises a fact question of fraud or conspiracy in 1961.

If there were defects in the 1961 agreement they have been waived; by acceptance of monetary benefits under the agreement the Belveals ratified and confirmed what Athey had done in their name; and the Belveals are now estopped to deny Mobil's estate.

The Belveals did not question the Mobil lease at any time from its inception in 1952 — not at the time of the original lease, nor at the time of the lease extension in 1961, nor when money came to the Belveals under the agreement in 1962, nor when fraud was first suspected in November, 1965, nor even, indeed, when the Belveals filed suit in February, 1966. Not until August 23, 1966, did the Belveals belatedly decide that they wanted cancellation of Mobil's lease.

This after-thought lawsuit has no merit. Mobil's Motion For Summary Judgment validating and confirming its lease should have been granted by the trial court, and was correctly granted by the Court of Civil Appeals.

B. The State Court Correctly Over-turned Petitioners' Summary Judgment to the Deeded Lands.

1. The Record Facts.

The facts quoted from the record in Part I A. of this brief are relevant here;[5] to avoid burdening the court we do not undertake to repeat those facts. To those already stated should be added:

(a) Following execution of and payment for the Lease agreement of May, 1961, Brim (a Mobil employee), Athey and Hodgden (a lease broker from Enid, Oklahoma), agreed to acquire jointly, if they could, the undivided 1/7 interest believed by them to be owned by the Belveals in Sections 44, 52 and 56, Block OW, T.T. Ry. Co. Survey, Section 18, Block 143, T. & St. L. Ry. Co. Survey, and part of Section 15, Block 48, T-8, T & P Ry. Co. Survey in Pecos County, Texas. (Brim Deposition, pp. 38-41).

(b) The Brim-Athey-Hodgden agreements were reduced to writing in March, 1962 and April, 1962. (Tr. 645-646).

(c) On or about March 29, 1962, Marion J. Belveal and the other plaintiffs executed and delivered to Charles B. Athey their general warranty deeds, bearing date of March 29, 1962 and April 4, 1962, recorded in Volume 253, pages 554, 558, 560, 562, 564 and 566, respectively, Deed Records of Pecos County, Texas. These are the deeds pleaded and described in plaintiffs' Fourth Amended

[5] Pages 9 through 14.

Original Petition and copies thereof attached thereto as Exhibits "E", "F", "G", "H", "I", "J" and "K". (Tr. 648, et seq.)

(d) The Belveals were paid $105,000.00 for these deeds. The purchase was made by Athey for the joint account of Athey, Brim and Hodgden. (Brim Testimony, Ex. AF to Fourth Petition, Tr. 938-940.)

(e) The Belveals *claim* they did *not* know that Athey was the purchaser under the seven 1962 deeds; that they were not fully advised of the information Athey had when he so purchased; that they would *not* have conveyed had they known all material facts. (Depos., Marion J. Belveal, Golda Belveal.) (This is a contradicted "fact." As discussed in the Athey and Hodgden briefs, there is competent evidence showing that the Belveal-Athey transaction was entirely proper. But this dispute of fact is not important to this part of our argument.)

(f) On October 22, 1962, Charles B. Athey executed and delivered to Socony Mobil Oil Company, Inc. a general warranty deed, recorded in Vol. 258, Page 556, Deed Records of Pecos County, Texas, covering a 1/14 interest in the oil, gas and other minerals in and under and that may be produced from the above mentioned and referred to Sections 44, 52 and 56, Block OW, and Section 15, Block 48, and an undivided 1/14 interest in and to the surface estate of Section 18, Block 143, T & St. L. RR. Co. Survey, all in Pecos County, Texas. A copy of this deed is attached as Exhibit "RR" to plaintiffs' amended petition.

(g) During 1964, Mobil learned that Brim had acquired, in violation of his duties to Mobil, certain mineral interests in Pecos County (Tr. 1106). Mobil then filed suit in U. S. District Court to impose a constructive trust on all property, and proceeds, illegally acquired by Brim (Ex. AE, Fourth Petition, Tr. 878).

(h) Following a partial hearing in Federal Court (Ex. AF, Fourth Petition, Tr. 891), Brim deeded to Mobil certain of the properties claimed by Mobil in the suit, and an agreed judgment of dismissal was entered in Federal Court (Tr. 1147). The Brim deeds to Mobil covered an undivided 1/168 in Sections 44, 52 and 56, Block OW, (Tr. 866), another undivided 1/168 in Sections 44, 52 and 56, Block OW (Tr. 868), and an undivided 1/42 in part of Section 15, Block 48 (Tr. 870). In consideration for these deeds, Mobil relinquished its claim to $28,000.00 received by Brim for a conveyance of part of the property to Childress Royalty Company (Tr. 1106).

(i) At the time suit was filed, and at the time the Brim deeds were obtained, *Mobil did not know of any claimed fraud* as between Brim, Athey and Hodgden, on the one hand, and the Belveals (Mobil's sworn Motion; Affidavits of Akin, Moriarity; Tr. 1082, et seq.)

The Belveals position is that the facts compelled a summary judgment against Mobil, cancelling the Athey to Mobil deed, because:

> 1. Athey, Brim and Hodgden defrauded the Belveals in March, 1962, when the Belveal to Athey deeds were obtained;

2. Brim was a Mobil vice-principal, hence Mobil is bound by his fraud; and

3. Mobil took its deeds and took title to its undivided interests charged with all knowledge possessed by Brim, so that a constructive trust should follow the land through Athey into Mobil.

In this portion of the brief we will examine the Belveal contentions 2 and 3 set forth above. We pretermit a discussion under claim number 1, which is squarely met in the brief of the respondents Hodgden and Athey.

Quite obviously if there was no initial fraud in March, 1962 — and if the trial court conclusion to the contrary is erroneous — no judgment can stand against *any* of the respondents. The Court of Civil Appeals has so held. We join in and endorse the Athey-Hodgden position with respect to original fraud.

Insofar as Mobil is concerned, however, two points should be made:

(1) *Even if the Athey-Belveal transactions involved fraud, no recovery can be had against Mobil.*

(2) *Even if a constructive trust is established against Athey, the trust would not reach Mobil's title.*

These conclusions we base on (1) the law as it applies to the Brim-Mobil relationship, and (2) Mobil's status as a bona fide purchaser for value.

2. Analysis Of The Facts And Law

a. *The Mobil-Brim Relationship*

A trusted Mobil employee for over eleven years, a licensed attorney, holder of the job of Division Staff Landman with Mobil, Brim was deeply involved in the workings of Mobil until February 1, 1963, when he resigned.* During his tenure with Mobil as Division Staff Landman, Brim was entrusted with confidental information concerning Mobil's activities and future plans for the conduct of its business — exploration, development, and production of oil, gas and other minerals.

In his employment by Mobil, Brim became aware that Mobil was desirous of acquiring leases and minerals in Pecos County, particularly in the Coyanosa area, because of Mobil's educated guess that this area might well be made productive of oil and gas.

Brim could not do the work for which he was employed without information such as this. But Mobil, realizing the need for safeguards against the frailties of human nature, asked of Mr. Brim these loyalties:

> *First*, that he not communicate company information to outsiders, and
>
> *Second*, that he not acquire for himself any mineral interests, nor aid others in such acquisition.

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*All of the facts stated here are established without contradiction or dispute. Each fact stated in his portion of the brief has been specifically pleaded by the Belveals (Fourth Petition, Tr. 580, et seq., with exhibits) or appears in Brim's deposition. We do not believe the Belveals will quarrel with this factual summary, and accordingly we do not burden the court by record references.

Mr. Brim not only understood these requirements, he expressly bound himself, in writing, to their observance.

The record before this Court contains no evidence of any wrongdoing by Brim until early 1962. This record is silent — save for the extravagant but unsupported claims of Belveals' pleadings — on any dereliction by Brim until his dealings with Athey and Hodgden in the spring of 1962 when the three reached agreement:

> (1) To purchase for their joint account stock in General Royalties Corporation, an Oklahoma company owning mineral interests in Pecos County, Texas, on which Mobil had an existing oil and gas lease (March 23, 1962); and
>
> (2) To purchase for their joint account, but in the name of Athey, from the Belveals
>
> (a) An undivided 1/7 interest in the oil, gas and other minerals in and under Sections 44, 52 and 56, Block OW, TT Ry. Co. Survey,
>
> (b) An undivided 1/7 interest in the oil, gas and other minerals in and under Section 15, except the West 200 acres of the North 1/2 thereof, in Block 48, T & P Ry. Co. Survey, and
>
> (c) An undivided 1/7 interest in the surface of Section 18, Block 143, T & St. L. Ry. Co. Survey, all of which lay in Pecos County.

These interests, except for the interest in Section 18, were subject to an existing lease owned by Mobil Oil Company (April 10, 1962).

During the period in which these transactions were made, and, in fact, to acquire such interests, J. K. Brim is said to have divulged confidential information, gained

through his employment, to both Athey and Hodgden. As a result of these agreements, Athey secured from the Belveals the seven deeds which this suit seeks to cancel. And as a result of this transaction, Brim stood to profit personally.

(1) *The Belveal claims concerning the Mobil-Brim relationship.*

Against this undisputed, uncontradicted factual background, the Belveals would have this Court believe, and hold, that Brim was acting as Mobil's agent in the Brim-Athey-Hodgden transactions, and that whatever Brim then came to know, Mobil, in law, must be held to have known.

The Belveal premise indeed is that Mobil ratified, confirmed, participated in, enjoyed the fruits of, and for all purposes gave its blessings to the dealings of Brim, Athey, and Hodgden.

(2) *The facts concerning the Mobil-Brim relationship.*

It is interesting to compare the Belveal claims with the record facts:

Fact 1. In his dealings with Athey and Hodgden commencing in early 1962, Brim operated through an alias bank account in Oklahoma, and through names other than his own *to prevent Mobil from learning of his activities.* (Testimony of Brim, Ex. AF to Fourth Petition, Tr. 898-909.)

Fact 2. The fruits of Brim's dealings, as taken by Mobil, were bitter indeed. Brim, Athey and

Hodgden paid the Belveals *$105,000.00* for an undivided *1/7* interest in the lands in question; Brim then arranged for Mobil to buy a *1/14* interest in these lands from Athey for *$120,000.00* Brim shared in the proceeds of the sale to Mobil. (Brim's Testimony, Ex. AF to Fourth Petition, Tr. 938-940.)

Fact 3. Brim's agreement with Athey and Hodgden to acquire, in Athey's name, the Belveal properties, was reduced to writing in April, 1962, but Brim never showed the agreement to Mobil, nor did he ever advise Mobil of his dealings with Athey and Hodgden. (Brim's Testimony, Ex. AF to Fourth Petition, Tr. 934-936.)

Fact 4. The acquisition by Brim of mineral interests from Belveal was unknown to Mobil and its officers, agents and employees until the calendar year of *1964*. (Affidavit, J. T. Akin, Tr. 1105, affirming Par. X of Mobil Answer to Summary Judgment.)

Fact 5. Mobil did not have knowledge of any fraud or fraudulent acts, on the part of Athey, Hodgden or Brim, or any allegations or claims thereof, until the filing of this lawsuit and whatever knowledge, if any, Brim had was never imparted to Mobil. (Affidavit, J. T. Akin, Tr. 1105, affirming Par. XII of Mobil's Answer to Summary Judgment.)

Fact 6. When Mobil discovered Brim's extra-legal activities, Mobil instituted suit in Federal Court to establish that Brim breached his trust and violated his duties. (Ex. AE to Fourth Petition, Tr. 878.)

These are record facts. We *challenge* the Belveals to show to the Court even one record reference which ques-

tions, or in any way contests the conclusion that *Brim was dealing for self — not employer — when he dealt with Athey and Hodgden.*

We dwell at some length on this basic proposition conclusively established by this record for but one reason: If Brim's conduct, and his knowledge, are not imputable to Mobil, the Belveals have no case against Mobil. If the Belveals cannot tie Mobil to Brim, *in the very transactions complained of*, Mobil will ultimately be entitled to the rendition of judgment in its favor.

And so, against what are the uncontroverted facts, let us examine the law which must tell us if Mobil is to be charged with what Brim knew, and what he did.

(a) *Brim's conduct was adverse to Mobil and created in Mobil legal rights enforceable in law and equity.*

A breach of faith such as Brim's is chronicled in *Hunter v. Shell Oil Co.*, 198 F. 2d 485 (5th Cir., 1952). The facts of that case as set forth in the Court of Appeals opinion were:

> "From 1930 to 1941, when he was discharged, the defendant Hunter was employed by Shell Company as senior geologist in its Houston office, where he was in direct charge of Shell's extensive exploration activities in a large area along the Gulf coast of Texas and Louisiana. Hunter's principal duties were to collect geological and geophysical information for use by Shell and to advise the company where to purchase oil and gas interests, where to drill test wells, and the like, for which purpose he was employed and paid full time. This information was

highly confidential. Hunter's relationship with Shell was of a fiduciary nature, in which the utmost good faith is mandatory. At all times during Hunter's employment, Shell had a rule prohibiting its employees from acquiring royalty and other mineral interests. This rule applied to Hunter, and he was aware of it.

"Early in 1941, Shell discovered that Hunter had been unauthorizedly divulging confidential information to one A. M. Joncas, one R. J. St. Germain, and to Southland Royalty Company, based upon which, and acting in numerous instances through the hereinafter mentioned corporations for concealment, they bought up royalty and other interests in oil lands discovered by Hunter in Texas, Louisiana and Arkansas, for which Hunter received, as his compensation for furnishing said information, fractional participations in their purchases. Sometimes these participation interests were taken by Hunter directly in his own name, sometimes under an alias, and in some instances through interests in some of the corporations involved. The company immediately discharged Hunter, and soon thereafter instituted these suits against him and some of those acting in concert with him in buying up mineral interests based upon Hunter's information. In its complaint, Shell prayed that each defendant be required to account for each of the interests so acquired by him, and that they be required to convey to Shell such of said interests as Shell should elect to recover, such conveyance to be conditioned upon Shell reimbursing defendants for the costs to them of such mineral interests.

"Shell asserts that by disclosing such confidential information, which was its exclusive property, and in aiding his associates to acquire the above mentioned mineral interests, Hunter breached his fiduciary duty to his employer; placed himself in a position where his personal interests conflicted with those of

his employer; and that in consequence Hunter and the persons and corporations who acquired mineral interests through his unauthorized disclosures, hold such interests as constructive trustees for Shell."

These facts resulted in the following holding by the appellate court:

> "An agent may trade for his own benefit outside the scope of his principal's business without being accountable for the profits realized. *But he is forbidden to deal with a subject matter of the agency, or to use for his own advantage information acquired while acting within the scope of the agency.* Nor may an agent put himself in a position in which personal interests may come into conflict with his duty to his principal, or which may afford him an opportunity to subordinate the interests of his employer to his own individual benefit while discharging his duties. Such conduct is not only morally wrong, it is contrary to public policy. *When property has thus been wrongfully acquired, equity converts the holder into a trustee, and compels him to account for all gains from such conduct.* Pratt v. Shell Petroleum Co., 10 Cir., 100 F. 2d 833, and cases cited text pages 836, 837; Ohio Oil Co. v. Sharp, 10 Cir., 135 F. 2d 303; Russell v. Republic Production Co., 5 Cir., 112 F. 2d 633; Barnsdall Oil Co. v. Willis, 5 Cir., 152 F. 2d 824; inden., 153 F. 2d 784; Trice v. Comstock, 8 Cir., 121 F. 620, 622-623, 61 L.R.A. 176; 2 Restatement Law of Agency, p. 83."

Pratt v. Shell Petroleum Corporation, 100 F. 2d 833 (10th Cir., 1938), was a suit brought by the oil company against one of its former employees who had been employed in a geological capacity, and who had acquired, in violation of a company rule of which he was aware, certain oil and gas interests in which the employer-com-

pany was operating, which acquisitions were based on geological information which had been acquired by the employee in the course of his employment. The court held:

> "An agent may traffic for his own advantage and benefit outside the scope of the business of his principal without being accountable for the profits realized. Latta v. Kilbourn, 150 U.S. 524, 14 S. Ct., 201, 37 L. Ed. 1169. *The inhibition is upon dealing with the subject matter of the agency and making use of information acquired while acting within the scope of the agency.* It is infidelity of that kind with opportunity of detriment to the principal subjects the unfaithful agent to liability for the gains and profits."

No better words may be chosen to describe the duty of Brim to Mobil than those of Mr. Justice Cardoza in the famous opinion of *Meinhard v. Salmon*, 249 N.Y. 458 (1928), wherein he declared:

> "Many forms of conduct permissible in a workday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. On this has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

The Texas rule is the same as that stated in the cases cited above. *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.

2d 256 (S. Ct., 1951); *Smith v. Bolin*, 153 Tex. 486, 271 S.W. 2d 93 (S. Ct., 1954); *Omohundro v. Matthews*, 161 Tex. 367, 341 S.W. 2d 401; *Gaines v. Hamman*, 163 Tex. 618, 358 S.W. 2d 557 (S. Ct., 1962); *Barnsdall Oil Co. v. Willis*, 153 F. 2d 784 (5th Cir., 1946); *Nye v. Lovelace*, 228 F. 2d 599 (5th Cir., 1956); *Bishop v. United States*, 266 F. 2d 657 (5th Cir., 1959); *United States v. Bowen*, 290 F. 2d 40 (5th Cir., 1961).

Characteristic of these holdings is *Nye v. Lovelace*, supra, the most recent case involving an unfaithful servant who sought private gain to the detriment of his principal. It was there stated:

> "Here, an unfaithful servant, whose activities from the inception were in breach of heavy duties, undertook, with circumstances strongly suggesting a studied furtiveness, to capitalize upon the information which had come to him under an obligation of trust, and in doing so, he sought to make decisions and resolve questions for his principal in which he stood to gain or lose as self-interest prevailed or was submerged. That which he has obtained by these means, he must restore."

(b) *Since Brim was acting for himself, Mobil is not bound by Brim's conduct, or knowledge.*

It would be indeed anomalous if Mobil, the *victim* of Brim's wrongdoing, is regarded in law as *guilty* of Brim's wrongdoing. Yet such was the claim of the Belveal Motion for Summary Judgment, and such was the result of the trial court judgment. *No court has ever so held before.*

The Supreme Court states in *Cotton v. Rand*, 51 S.W. 835, 53 S.W. 343:

> "We are clearly of the opinion that such a breach of duty on part of an agent, unless condoned by the principal with a full knowledge of the facts, puts an end ipso facto to the agency. *The law requires fidelity of agents, and holds them no longer capable of representing their principals, when, without the knowledge of the latter, they acquire an interest in the matter of the agency adverse to that of their employer.*"

In *Holmes v. Uvalde Nat. Bank*, 222 S.W. 640 (Tex. Civ. App., err. ref.), the cashier of a bank, without the knowledge or consent of the directors entered into an arrangement for loaning money which was concealed from the bank directors. ("All of the testimony tended to show that appellant and Rheiner did not desire that the bank should know that Rheiner was lending money for appellant, but studiously concealed it from the bank.") Likewise, the record here shows that Brim did not want Mobil to know what was going on and studiously concealed the true facts from it. The discussion in the *Holmes* case includes the following:

> "The rule imputing notice to the principal of the acts of agents is usually based upon the theory that it is the duty of the agent to communicate to his principal the knowledge possessed by him relating to the subject-matter of the agency, and the presumption that he has performed that duty. But this presumption is destroyed where the agent, through nominally acting as such, is in reality acting in his own or another's interest, and adversely to that of

his principal. Mechem on Agency, Sec. 1815; Kauffman v. Robey, 60 Tex. 311, 48 Am. Rep. 264; Texas Loan Agency v. Taylor, 88 Tex. 47, 29 S.W. 1057; Allen v. Garrison, 92 Tex. 546, 50 S.W. 335; Cooper v. Ford, 29 Tex. Civ. App., 253, 69 S.W. 487; LaBrie v. Cartwright, 55 Tex. Civ. App., 144, 118 S.W. 785; Allen v. Railroad, 150 Mass. 200, 22 N.E. 917, 5 L.R.A. 176, 15 Am. St. Rep. 185.

"As said in the last-cited case by the Massachusetts' court:

> " 'The general rule is that notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal. * * * *There is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent.* It may be doubted whether the rule and the exception rest on any such reasons. *It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it.* On this view, such a fraud bears some analogy to a tort willfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to

him by his master. *Whatever the reason may be, the exception is well established.*'"

See also *Richardson v. Wesley*, 1 S.W. 2d 1098; *Peterson v. Holland*, 189 S.W. 2d 94 (Tex. Civ. App., err. ref.); *Harrington v. McFarland*, 21 S.W. 116 (Tex. Civ App., writ den'd.); *Reed v. Hester*, 44 S.W. 2d 1107 (Comm. App.); and *Binder v. Millikin*, 201 S.W. 239 (Tex. Civ. App., err. ref.).

The El Paso Court of Civil Appeals dealt with the question in *Ziegler v. Federal Land Bank of Houston*, 86 S.W. 2d 864, err. dism'd., and expressly recognized and approved "*the rule that where a third person acts in collusion with the agent to defraud the principal, the latter will not be chargeable with any information which the agent receives pertaining to the transaction.*"

The many cases in accord include *T. P. Coal & Oil Co. v. Belcher*, 265 S.W. 1081, n.w.h.; *Parkersburg Rig & Reel Co. v. Golden*, 277 S.W. 1106, n.w.h.; *Brady v. Garrett*, 66 S.W. 2d 502, er. dism'd; *Ackerson v. Farm & Home Sav. & Loan Asso.*, 77 S.W. 2d 559, err. ref.; *Scripture v. Scottish-American Mortgage Co.*, 49 S.W. 644, err. ref.; *Campbell v. Crowley*, 56 S.W. 373; *Cooper v. Ford*, 69 S.W. 487, err. ref.; *Humphreys v. Stanford Sav. & Loan Asso.*, 80 S.W. 2d 438, err. ref.; *U. S. F. & G. Co. v. San Diego State Bank*, 155 S.W. 2d 411, err. ref., w.o.m.

These principles are by no means confined to Texas; it is held generally that the knowledge and conduct of an agent is not imputable to the principal where the agent

accepts money from an adverse party, has an adverse interest, *or acts in collusion to deceive his principal. 37 C.J.S.*, Fraud, Sec. 27, p. 269; *Barnsdall v. O'Day*, 134 F. 828; *Woteshek v. Neuman*, 138 N.W. 1000; *American Nat. Bank v. Miller*, 229 U.S. 517, 57 L. Ed. 1310; *Anderson v. General American Life Ins. Co.*, 141 F. 2d 898, cert. den., 323 U.S. 789, 89 L. Ed. 637; *Lea v. Iron Belt Mercantile Co.*, 42 So. 415; *Mott v. Nardo*, 166 P. 2d 37; *Reardon v. Mutual Life Ins. Co.*, 86 A. 2d 570; *Mutual Assur. Co. v. Norwich Sav. Soc.*, 24 A. 2d 477; *Vincennes Sav. & Loan Asso. v. St. John*, 12 N.E. 2d 127; *Nissen v. Nissen Trampoline Co.*, 39 N.W. 2d 92; *Newco Land Co. v. Martin*, 213 S.W. 2d 504 (Mo.); *Coronado-Inglenook Land & Development Co. v. Black*, 96 S.W. 2d 727; etc.

3 Am. Jur. 2d, Agency, Sec. 282, summarizes it as follows:

> "There is a well established exception to the general rule that the knowledge of an agent is to be imputed to the principal, in situations where the conduct and dealings of the agent are such as to raise a clear presumption that he will not communicate to the principal the facts in controversy, as where the agent acting normally as such is in reality acting in his own business or for his own personal interest and adversely to the principal, or is acting fraudulently against the interests of the principal, or for any other reason has a motive or interest in concealing the facts from his principal. This is the case where the agent is engaged in committing an independent fraudulent act on his own account and the facts to be imputed refer to this fraudulent act so that the communication of such facts to the principal would necessarily prevent the consummation of the fraud."

It also there stated:

> "This rule also applies where the agent is engaged in prosecuting some fraudulent or illegal enterprise the success of which would be impaired or defeated by the disclosure to his principal of the notice or knowledge sought to be imputed. In all such cases, it is obvious that the agent will not communicate the true facts to the principal and there is no latitude for any presumption that he will."

b. *Mobil's Status As A Bona Fide Purchaser*

The policy of the law is to protect the purchaser from secret titles, legal or equitable. *Fleming v. Ashcroft*, 175 S.W. 2d 401 (Tex. Sup. Ct.).

A bona fide purchaser of property from the apparent legal owner is afforded protection by the law, and he takes good title and may hold the property in question as against an outstanding equity or interest of a third person, or against any claim based upon fraud or mistake, or against a claim of constructive trust. *Jones v. Robb*, 80 S.W. 395 (Tex. Civ. App., err. ref'd.); *Wilson v. Meredith*, 268 S.W. 2d 511 (Tex. Civ. App., err. ref'd., n.r.e.); *Sydnor v. Roberts*, 13 Tex. 598; *Pure Oil Company v. Swindall*, 58 S.W. 2d 7 (Tex. Com. App.); *Schneider v. Sellers*, 61 S.W. 541 (Tex. Civ. App., err. dismd., w.o.j.). In *Sydnor v. Roberts*, it was expressly held, by the Supreme Court, to be a rule of law that a bona fide purchaser for value will be protected, whether he purchased from a fraudulent grantor or from a fraudulent grantee. This rule of law has always remained inviolate in this state.

A bona fide purchaser is one who makes a good faith purchase of real property for a valuable consideration without actual or constructive notice of an outstanding equity or an adverse interest or title. *Garrison v. Crowell*, 67 Tex. 626, 4 S.W. 69; *Middleton v. Johnston*, 110 S.W. 789 (Tex. Civ. App., err. ref'd); *Houston Oil Company v. Niles*, 225 S.W. 604 (Tex. Com. App.).

There is no question under this record but that Mobil paid a valuable consideration for its interests in the property in question. $120,000 was given for the 1/14 interest deed from Athey to Mobil in October of 1962 and this is undisputed. Also, the additional interest acquired from Brim resulting from the Federal Court action was supported by consideration which is undisputed (Affidavit of J. T. Akin, Tr. 1156-1158).

Under this record Mobil purchased the property in good faith, without notice of any outstanding equity. This is the entire burden of our prior argument that Mobil cannot, in law, be held to any knowledge acquired by Brim when Brim was acting in self-interest, though within the general employ of Mobil.

It must always be borne in mind that the Belveals, who asserted an equitable interest, had the burden of proof as against Mobil, the holder of legal title, to establish that Mobil was not a bona fide purchaser for value. *Tasher v. Foster Lumber Company*, 205 S.W. 2d 665 (Tex. Civ. App.); *Harvey v. Humphreys*, 178 S.W. 2d 733 (Tex. Civ. App.); *Teagarden v. Godley Lumber Company*, 154 S.W. 973 (Tex. Sup. Ct.).

Wherein did the Belveals carry this burden of proof? It can be said only that this record establishes that Brim was an employee of Mobil during the calendar year 1962, the period of time that Brim embarked upon his course of self-dealing which involved him in the Athey-Belveal transactions. Nothing further was proved by the Belveals that can in any way be claimed to represent *proof* that Mobil was not a good faith purchaser for value. But this proof is without legal signifiance. The Belveal claims —that Mobil's status as a good faith purchaser is destroyed by reason of the fact that Brim knew of and participated in the taking of the deeds from the Belveals, and that Mobil is charged with notice of all defects in the Athey acquisition of title because of Brim's participation — are answered by those cases already discussed wherein it is held that notice to a self-dealing agent is not notice to his principal.

We need not, however, be content with the general rules established by these cases; there is specific Texas authority which mercilessly exposes the flaws in the Belveal claim of destruction of Mobil's status as a good faith purchaser. We refer to those cases best illustrated by *LaBrie v. Cartwright*, 118 S.W. 785 (Tex.-Civ. App., 1909).

This trespass to try title action involved conflicting claims to a 600 acre tract originally owned by R. G. Cartwright. R. G. Cartwright deeded the land to Matthew Cartwright in 1845; this deed was not recorded. After R. G. Cartwright's death, his heirs conveyed to H. G.

Damon, for a valuable consideration. Damon had no actual notice of the prior deed; nor since it was unrecorded, did he have constructive notice. Damon was assisted in making his purchase by S. M. Johnson, who, the evidence revealed, knew of the earlier Cartwright deed but was to receive one-half of the sales price if a sale was made by the Cartwright heirs to Damon. Johnson then arranged the sale to Damon, *acting as agent for Damon.*

When the case was tried, the claimants under the first, but unrecorded, deed vehmently denied the status of good faith purchaser to Damon, saying, as do the Belveals here:

> "Your agent knew, therefore you knew of the earlier deed. Having such knowledge, in law, you are not a good faith purchaser."

The trial court accepted this contention. On appeal, however, the claim of notice through the self-dealing agent was summarily disposed of. The Court speaks thus:

> "We can see no escape for appellee from this proposition, for the doctrine that a principal is chargeable with notice known to his agent is based, not only upon the fiction of identity, but also upon the fact that it is the duty of the agent to communicate his knowledge to his principal, and the presumption that he has performed his duty. *No such presumption can arise, however, where the agent is dealing with the principal in his own interest, or where for any other reason his interest is adverse to his principal, so that it is to his own interest not to communicate the knoweldge to the principal.* In such a case the general rule, that notice to an agent is notice to his

> principal does not apply. Harrington v. McFarland, 1 Tex. Civ. App. 292, 21 S.W. 116; Kauffman v. Robey, 60 Tex. 311, 48 Am. Rep. 264; Texas Loan Agency v. Taylor, 88 Tex. 47, 29 S.W. 1057; Allen v. Garrison, 92 Tex. 546, 50 S.W. 335; Cooper v. Ford, 29 Tex. Civ. App. 253, 69 S.W. 487; Clark & Skyles on Agency, Sec. 485; Mech. Ag. Sec. 723. It is undisputed that Johnson had a half interest in the land and received such an interest in the proceeds of the sale of the same which he effected to Damon. Therefore, even if it should be conceded that he was Damon's agent in procuring his purchase of the land from the heirs of Robert G. Cartwright, his knowledge, if any he had, of the prior deed to Matthew Cartwright or the claim of appellee to the property, or of any fact sufficient to put him on an inquiry, could not, under the principle of law stated, be imputed to Damon."

The *Cartwright* opinion is obvigously correct. The case has been consistently cited with approval, and it is followed in legal principle by *Teagarden v. Godley Lbr. Co.*, 154 S.W. 973 (Tex. Sup. Ct. 1913). There Teagarden claimed equitable title to a 1/3 interest in a tract of land, legal title to which was in the Lumber Company. Teagarden claimed that he, one other adventurer, and Mr. Godley (the President of the Lumber Company) had agreed to speculate in land; that Mr. Godley was to take legal title, as trustee for the three partners, to lands acquired through their joint efforts. The three located and bought 1,111 acres and put title in Godley, as trustee. Godley then sold the land (pocketing the proceeds) to Coleman Lumber Company, which in turn sold it to Godley Lumber Company for a valuable consideration. Oddly enough, Mr. Godley was President of Coleman

Lumber Company also. Teagarden convinced the trial court that Godley Lbr. Co. was not a good faith purchaser for value, claiming, of course, that since Mr. Godley, a corporate officer, knew of Teagarden's equitable title the corporation itself must, in law, be charged with such knowledge.

The Supreme Court would not, and did not, so hold. The Court did hold:

> "The right of the plaintiff Teagarden in the land is an equity. The Godley Lumber Company has the legal title. The rule is that under this state of facts the burden was upon plaintiff to show notice to the Godley Lumber Company. Barnes v. Jamison, 24 Tex. 362; Baldwin v. Root, 90 Tex. 546, 40 S.W. 3; Rogers v. Houston, 94 Tex. 403, 60 S.W. 869.
>
> "There is no evidence of notice to either of the corporations except the undisputed fact that R. B. Godley was the president of each of them at the time the land was conveyed to him, and at the time the agreement was made between him and plaintiff for purchase of the land. By the allegations of the petition and the evidence it appears that Godley was acting for himself, and that he, in fact, sold the land to the Coleman Company for a valuable consideration. It has been well settled in this state that a principal, whether a corporation or natural person, is not affected by notice which comes to the agent or officer, unless such knowledge was acquired while in the transaction of the business of his principal. Texas Loan Agency v. Taylor, 88 Tex. 49, 29 S.W. 1057; Kauffman & Runge v. Robey, 60 Tex. 308, 48 Am. Rep. 264; 3 Cook, Crop. Sec. 727; Bank v. Loyhed, 28 Minn. 396 10 N.W. 421; Bank v. Brett, 62 Minn. 4, 63 N.W. 1067; Bank v. Sharpe, 40 Neb. 123, 58 N.W.

734; Terrell v. Bank, 12 Ala. 502; Cooper v. Ford, 29 Tex. Civ. App. 253, 69 S.W. 487.

* * * * *

"The right of action claimed by the plaintiff being an equity in the land and the legal title being in the Godley Lumber Company, the burden was on the plaintiff to prove that defendant had notice of his equity, or that it did not pay a valuable consideration therefor. There is no evidence that Godley represented the corporation in the purchase of the land, but the allegations of plaintiff's petition and his own evidence show that the purchase was made and deed taken to secure the land to the three persons, Godley, Rucker, and plaintiff, for sale to some sawmill for profit * * * Therefore the information of plaintiff's trustee acquired as such cannot be imputed to a purchaser from such trustee."

In *Bunton v. Palm*, 9 S.W. 182 (Tex. Sup. Ct., 1888), a claim of "knowledge to the agent — knowledge to the principal" was urged to defeat the status of a good faith purchaser for value. The agent in question was "acting for both buyer and seller, which is contrary to law and public policy." (9 S.W. at 184-185.) The Court held:

"But Palm, in fact, had no notice, actual or constructive, of any infirmity in Wells' title; on the contrary, Bergen assured him that it was good. It is not doubted that the principal, as a general rule, is bound by the knowledge of his agent, acquired either during or shortly before the employment commenced. In this case, however, Bergen was acting for both buyer and seller, which is contrary to law and public policy. Story, Ag. Secs. 210-212. Palm does not appear to have known that Bergen was acting as agent for Wells, or to have discovered that fact until this trial. Under these circumstances, to charge him with Bergen's knowledge would be equivalent to charging him with

the knowledge of Wells, whose agent Bergen was, and would be manifestly unjust, and unsupported by any of the analogies of the law. The reason for charging the principal with the knowledge of the agent is that the agent is supposed to represent the interest of the principal. In this instance Bergen was as much the representative of Wells as of Palm, and for that reason we are of the opinion that Palm cannot be charged with Bergen's knowledge."

And in *First Texas Joint Stock Land Bank v. Chapman*, 48 S.W. 2d 651 (Tex. Civ. App., 1932), the Court held:

"* * * if it be said that those two persons, or either, was such agent of the appellant bank as to ordinarily affect it with their knowledge, and that they knew or ought to have known that the land involved was the homestead of the Chapmans in October, 1918, as appellant alleged, their acts in the matter constituted such fraud as will relieve the appellant bank from the burden of such agent's knowledge, if any, of the invalidity of the note and trust deed to the City National Bank of Decatur. The authorities are uniform to the effect that a principal is not affected by notice to an agent who is acting adversely to the interests of his principal, and either for his own benefit or for the benefit of a third party * * *

"And in Pickett v. Dallas Trust & Savings Bank, 24 S.W. 2d 354, the Commission of Appeals said, among other things, that: '* * * If Fannin was not acting in good faith with his principal, the principal was not bound by the knowledge of the facts for the reason that Fannin thereby became a party to the fraud and the agent of the persons he collusively served.'

"See also, Kauffman & Runge v. Robey, 60 Tex. 308, 48 Am. Rep. 264; Texas Loan Agency v. Taylor, 88 Tex. 47, 29 S.W. 1057; Teagarden v. R. B. Godley Lbr. Co., 105 Tex. 616, 154 S.W. 973."

Our research has not produced any cases which support the Belveal claim that Mobil's status as a good faith purchaser for value is destroyed by Brim's alleged knowledge of the details of Athey's acquisition of title.

3. Conclusion — Mobil's Deeded Lands

Had Brim not been engaged in a course of self-dealing, had he not put himself in a position adverse to Mobil, had he not been engaged in a personal fraud against Mobil — then perhaps the Belveals could validly claim that what Brim knew, Mobil knew. But these are not the facts here. This record places Brim right where he chose to be — squarely adverse to Mobil, in complete violation of his duties and obligations, engaged in a fraud against his employer.

Under these facts, the trial court erred most grievously in accepting the Belveal contention that the Belveals should take from Mobil those properties which Mobil bought in good faith, for a valuable consideration, on the sole basis that Mobil is charged with knowledge actually known only to Brim.

Once our courts determine, as we know they must after a full trial on remand, that Mobil was a bona fide purchaser for value of its mineral interests in the property in question, there will ultimately be a rendition of judgment for Mobil confirming Mobil's title to *this* property, in addition to its leasehold estate.

Mobil stands ready to make its proof on trial, after remand. Mobil will, we believe, prevail as a matter of law after a full trial. For these reasons we accept the El Paso Court's order of remand.

II. Procedural Due Process Was Afforded Petitioners

A. *Petitioners' Claims Re-examined.*

The Belveals would have this Court believe that Mobil contumaciously ignored a trial court discovery order, that the Belveals were thereby prevented from developing their case, and that the trial court thereafter punished Mobil by the entry of a default judgment under Rule 170, Tex. R. Civ. P.

Petitioners would have the Court believe that the State appellate courts over-turned this judgment without cause, thereby denying the Belveals due process of law.

B. *The Record Facts*

The record supports not even one of the Belveal claims. There was no disobedience. There was no deprivation of the right of preparation. There were no trial court sanctions sought, or entered, against Mobil. To the contrary, the record shows:

1. On November 30, 1966, Petitioners moved for discovery under Rule 167, Texas Rules Civil Procedure, to require the production of certain documents. (Tr. 172)

2. On December 31, 1966, the trial court entered its order permitting discovery (Tr. 326), and requir-

ing Mobil to produce certain documents on January 5, 1967. (Tr. 326)

3. On January 2, 1967, the trial court order was filed (Tr. 329), simultaneously with the filing of Mobil's objections to the Petitioners' *Motion.* (Tr. 322-325)

4. Mobil's counsel produced Mobil's records for examination in Fort Stockton, Texas (Petition, Appendix Exhibit K, pp. A39-40), but petitioners counsel felt they were "scanty," and "shed no light whatsoever upon the real issues in this case." (Petition, Ex. K, A40)

5. On January 12, 1967, Mobil filed objections to the trial court's Order. (Tr. 330-336)

6. Mobil's objections to the order for discovery were never heard nor determined by the trial court.

7. Petitioners, on January 25, 1967, twenty days after the date specified for production of documents, filed a 30-page Motion for Summary Judgment against Mobil (Tr. 1052-1082); this Motion makes no claim of disobedience, seeks the imposition of no sanctions under Rule 170, Texas Rules of Civil Procedure, and assets no right to a default judgment by reason of disobedience. To the contrary, the January 25, 1967 Motion asserted the absence of any fact issue and *moved for judgment under Rule 166A, Tex. R. Civ. P.*

8. No court has been asked to determine, and of course no court has determined:

(a) Did Mobil violate a discovery order;

(b) Was contumacious conduct involved;

(c) Are the harsh sanctions of Rule 170 here appropriate?

9. The trial court entered judgment on March 30, 1967, sustaining petitioners' Motions for Summary

Judgment (Tr. 1223). The judgment contains no recitations as to:

(a) Any alleged disobedience by Mobil;

(b) Any alleged contempt by Mobil;

(c) Any sanctions imposed under Rule 170, Tex. R. Civ. P.;

(d) Any entry of judgment by default.

C. Conclusion

Petitioners' denial of due process claims are woven from whole cloth. They are directly refuted by the record.

If, on January 5, 1967, counsel for petitioners really believed that Mobil has disregarded the trial court's order of December 31, 1966, is it unreasonable to assume that he would have brought this to the trial Court's attention?

The undisputed fact that he did not — that no motions were filed, no orders entered — demonstrates full well that the claim of disobedience is a straw man.

If, on January 25, 1967, counsel for petitioners really believed that he had been deprived of the opportunity of preparing his clients' case, due process of law allowed him to seek relief from the trial court. His failure to avail himself of the available remedies — his conscious move instead under the summary judgment rule — shows full well that he knew there had been no disobedience of the trial court order.

III. No Constitutional Rights Were Abridged

A. *Petitioners' Claims Re-examined*

Petitioners assert that the State Court has inflicted grievous procedural wounds by (1) requiring petitioners to try their case under the Texas form of action known as "trespass to try title," (2) denying petitioners the right to enforce a constructive trust, and (3) compelling petitioners to join indispensable parties upon re-trial of this action.

B. Analysis of the State Court Judgment

1. *Form of action chosen by Petitioners.*

The State Court of Appeals was presented an appeal from a trial court judgment drawn by counsel for petitioners (Tr. 1197), based upon a 391 page Fourth Amended Original Petition filed by counsel for petitioners (Tr. 580).

The State Court's study of these instruments led the court to conclude:

> "The plaintiff-appellees in their petition alleged:
>
> > "'Plaintiffs bring this suit to set aside certain deeds and to recover possession and title to certain property which was taken from them by the fraud of defendants and which property defendants still fraudulently retain.
> >
> > "'Plaintiffs claim that they are entitled to ownership, title and possession of the following interest in lands and are entitled to have certain deeds set aside and to have adjudication of or

reconveyance to them of ownership, title and possession of the following interest in lands: * * *'

"They then pleaded their title from [illegible]e sovereignty of the soil, maintained that the cou[illegible]had jurisdiction of the out-of-state defendants under Article 1975 (because the suit was one for an interest in land), and they prayed for an award of title and possession. Their motions for summary judgment recite that they are based on their pleadings."

"Plaintiffs now disavow the trespass to try title action and maintain that the judgment can stand solely on their action for cancellation of the deeds under the claim of fraud and breach of fiduciary relationship. The judgment ordered cancellation of the deeds, ordered the defendants to execute various deeds to plaintiffs and their attorneys, and ordered the defendants to account for rents and revenues accrued during their possession. Thus the plaintiffs obtained all which they could have obtained under the trespass to try title count, and much argument is presented as to whether this was or was not such an action. Since plaintiff-appellees now urge that theirs is not a trespass to try title action, in the face of such abandonment it is probably unnecessary to consider such form of action as supporting the summary judgment rendered. *But* they also seek to rely on legal reasons to support the judgment — deeds improperly notarized and acknowledgments of some deeds by a party in interest — and they seek to show their establishment of a chain of title by reference to their pleadings."

"In Land v. Turner, 377 S.W. 2d 181 (Tex. 1964), the Supreme Court summarized the burden of plaintiffs-appellees under this count:

> "'To recover in trespass to try title, the plaintiff must recover upon the strength of his own title. Hejl v. Wirth, 161 Tex. 609, 343 S.W. 2d

> 226 (1961). He may recover by (1) proving a regular chain of conveyances from the sovereign, (2) by proving a superior title out of a common source, (3) by proving title by limitations, or (4) by proving prior possession, and that the possession had not been abandoned.'
>
> "Each of these is an independent ground of recovery, but none of them were proved in the summary judgment action before us, so that the judgment cannot stand on such grounds in any event, whether abandoned or not."

It is perfectly obvious that the State court was analyzing what the record contained — not dictating the future course of this litigation. And so the Court observed

> "Plaintiffs pleaded and admitted the execution and delivery of the deeds, their acceptance and retention of the consideration, and the present possession of the lands by the defendants. They contend that they should not be bound by them because of a form of fraud arising out of the deeds having been delivered in blank as to the grantee, the insertion of the name of defendant Athey as such grantee, and the existence of a fiduciary relationship between them and Athey. Stripped of the trespass to try title count, the plaintiffs' cause of action is one for cancellation of deeds by the grantors for fraud. Yet the judgment goes farther. It first cancels the seven deeds in which the plaintiffs are grantors and Athey is the sole grantee. If then orders Athey and the other defendants to execute deeds of special warranty to the plaintiffs and their attorneys, and to execute certain deeds between the various defendants, some conditioned on the delivery to the clerk of the court of other deeds, apparently to make up deficiencies and correct inequities among those defendants who were strangers to the canceled instruments, but deraigned their title thereunder. The

various defendants were ordered to account for rents and revenues accrued during their possession, and in turn were to receive back out of such funds the consideration paid for their deeds. This being a summary judgment case, when we speak of the evidence or proof throughout this opinion, it will mean that we have viewed same in the manner required under Rule 166-A, T.R.C.P., as to which see Great American Reserve Ins. Co. v. San Antonio Pl. Sup. Co., 391 S.W. 2d 41 (Tex. 1965). If we assume that the proof was sufficient to warrant cancellation (but we expressly find that it was not), the judgment rendered cannot stand, for it goes beyond cancellation, and, in effect, grants recovery as though in trespass to try title. Cancellation was a necessary preliminary step to recovery of the land. Chicago T. & M. Ry. Co. v. Titterington, 84 Tex. 218, 19 S.W. 472; Deaton v. Rush (1923), 113 Tex. 176, 252 S.W. 1025. But the establishing of an equitable right — that they were entitled to cancellation — and the simple act of cancellation, could not operate to take the land away from all who were in possession under claims of title and restore it to plaintiffs. As a very practical matter, the solemn act of canceling the deeds — that they 'be set aside, voided and held for naught' — left nothing to be conveyed, as thereafter ordered by the judgment, and certainly nothing to warrant as title.

"Very simply stated, the suit was for cancellation, but the judgment was for complete recovery of the land, and it was against all parties claiming an interest therein. Athey was the only defendant who was a party to the canceled instruments. The other defendants were in possession under duly recorded deeds. Not being a party to the instruments sought to be canceled, they could have been made parties to the conflict only because of their interest in the land. Clearly, then, the judgment operates as an adjudication of title to an interest in land."

Petitioners' complaints should be directed at their own counsel and not at the Court below. It was these lawyers who sued for title and possession and who pleaded a chain of title, thus casting the suit as one in trespass to try title.

2. *Indispensable parties are lacking.*

As an element of their case to prove title to the lands here involved, the Belveals sought cancellation of seven deeds executed by them in 1962, which deeds conveyed record and legal title to Charles Athey.

Had no transfers of title been made between March 29, 1962 (the date of the questioned deeds) and March 30, 1967 (the date of judgment), there would be no problem of parties. But this record shows without dispute:

1. Following delivery of the 1962 deeds by the Belveals, Charles Athey conveyed mineral interests to Jack L. Russel and Childress Royalty Company. (Mineral Deeds, Ex. 3 and 5, Ex. Volume.)

2. Following delivery of the 1962 deeds Charles Athey executed an oil and gas lease on the property covered by the deeds. This leasehold estate is, or has been, claimed, in whole or in part, by Robert R. South, Midwest Oil Corporation, Ralph Lowe, Inc., Horace Smith and Redco Inc. (Oil & Lease, Ex. 10; Assignment of Oil and Gas Lease, Ex. 11-14, 32, all found in Exhibits Volume.)

3. After severance of the mineral estate by deed and lease as above described, a series of conveyances vested title to overriding royalty interests in the Belveal-Athey properties in Betty Whitehead; Pittsburg National Bank and H. A. Bergstrom; Mrs. Hugh Frenzel; N. B. Turner; Fred Goodman; Charles Perry; John J. Dorr; Duane J. Magee; Midland National Bank; Clayton Williams; Coyanosa Company; and Scope Royalty Co. (Assignments of Overriding Royalty and Conveyances of Royalty, Ex. 15-13, all found in Exhibits Volume.)

It is obvious that every person, every company, every bank listed in the foregoing paragraphs has had his title affected by the decree of cancellation. If the Belveals' deeds to Athey *are cancelled, set aside and held for naught as the trial court ordered,* then every person named has lost title to real property without every being allowed the opportunity to appear and defend his title.

The Supreme Court of Texas, in *Sharpe v. Landowners Oil Ass'n.*, 127 Tex. 147, 92 S.W. 2d 435, has held:

> "It is settled beyond all question in this state that in a suit to cancel a written instrument all persons whose rights, interest, or relations with or through the subject matter of the suit will be affected by the cancellation are necessary parties. The absence of a necessary party in the suit for cancellation is fundamental and jurisdictional to such extent that it must be considered by this court."

The law recognizes that basic concepts of due process demand that a party to be affected by a judgment be given fair notice of the proceedings, and a fair opportunity to be heard. This recognition is given in the doctrine of *indispensable parties* — a doctrine designed by the courts to insure that no man's rights of contract or property will be altered without his presence in court.

In *Hill v. Carr*, 307 S.W. 2d 828, it was recognized that indispensable parties are those "whose interests will necessarily be affected by any judgment that may be rendered therein." The trial court could not, lawfully, enter judgment affirming the Belveals' claims unless and until all of the parties affected by such judgment were before the court. This was the exact holding of the court in the *Hill* case which in turn cited *Veal v. Thomason*, 138 Tex. 341, 159 S.W. 2d 472, the case universally recognized as the leading Texas authority on joinder of parties. After holding that the royalty owners were indispensable parties, Justice Critz, speaking for the Supreme Court in the *Veal v. Thomason* case, said:

> "There is no escape from this conclusion, because Thomason seeks in this action to obtain a judgment freeing this land from the Texas Company lease, and if this is done by judgment which names such company only, *the royalty owners under the other leases in this unitized block will have had such royalty interest in this land, for all practical purposes, cut off and destroyed without having had their day in court.*"

Other cases to similar effect are *Sharpe v. Landowners Oil Ass'n.*, 127 Tex. 147, 92 S.W. 2d 435; *Leach v. Brown*, 251 S.W. 2d 553, writ ref.; *Frost v. Stanolind Oil & Gas Co.*, 307 S.W. 2d 136, writ ref.; and *Royal Petroleum Corporation v. Dennis*, 332 S.W. 2d 313 (S. Ct.)

C. *Conclusion.*

The spectres which petitioners conjure up are self-made. Petitioners pleaded their case one way (for title and possession and cancellation of instruments), but now feel aggrieved that the courts have adjudged the case on this basis. Petitioners failed to join those parties whose joinder is necessary under State land law, and feel injured because the courts have held them to the requirements of State law.

Petitioners simply have no complaint that does not relate to the inadequacies of their own case.

IV. CONCLUSION

The respondents ask that the writ of certiorari here sought be denied. There are no substantial federal questions present in this case involving State land titles.

Petitioners were afforded substantive and procedural due process, and this case should now return to the Dis-

trict Court of Pecos County, Texas for trial on the merits of petitioners' claim to the deeded land in controversy.

It is urged that this writ be denied.

Respectfully submitted,

Jack T. Akin
Tom Sealy
Rush Moody, Jr.

W. B. Browder

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CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari has been forwarded to all counsel of record on this the 25th day of June, 1969.

W. B. Browder

W. B. Browder, Jr.

EXHIBIT "A"

SOCONY MOBIL OIL CORPORATION v. BELVEAL

OPINION

PRESLAR, Justice.

This is an appeal from an order granting the motions for summary judgment of the plaintiffs, Marion J. Belveal, Golda Belveal Branom, joined by her husband, Dudley Branom, Price M. Belveal, Martin E. Belveal, Will Wyler, Ernest Wyler, and Eldabell McKenzie joined by her husband, R. I. McKenzie, individually and as heirs of Myrtle Belveal, deceased, Ida Oberg, deceased, and Milda Wyler, deceased, against defendants Mobil Oil Corporation, Charles B. Athey and Jack D. Hodgden. All defendants appeal from such judgment, and additionally Mobil Oil Corporation assigns error in the failure of the court to grant its motion for summary judgment.

The order granting the plaintiffs' motions for summary judgment is reversed and remanded for trial, and the order is reversed and rendered as to that portion of Mobil Oil Corporation's motion for summary judgment which pertained to the cancellation of its oil and gas lease.

[1] The plaintiff-appellees in their petition alleged:

> "Plaintiffs bring this suit to set aside certain deeds and to recover possession and title to certain property which was taken from them by the fraud of defendants and which property defendants still fraudulently retain.
>
> "Plaintiffs claim that they are entitled to ownership, title and possession of the following interest in lands and are entitled to have certain deeds set aside and to have adjudication of or reconveyance to them of ownership, title and possession of the following interest in lands: * * *"

They then pleaded their title from the sovereignty of the soil, maintained that the court had jurisdiction of the out-of-state defendants under Article 1975 (because

the suit was one for an interest in land), and they prayed for an award of title and possession. Their motions for summary judgment recite that they are based on their pleadings. Plaintiff-appellees, by their motions for summary judgment action, did not offer proof of their chain of title, superior title from a common source, nor did they offer proof of negating the "not guilty" and specially pleaded defenses. Defendants urge that this is fatal to the judgment entered, and they urge that they were entitled to all defenses allowed by their "not guilty" pleas and their specially pleaded defenses of laches, limitations and prior uncanceled deeds between the parties. Plaintiffs now disavow the trepass to try title action and maintain that the judgment can stand solely on their action for cancellation of the deeds under the claim of fraud and breach of fiduciary relationship. The judgment ordered cancellation of the deeds, ordered the defendants to execute various deeds to plaintiffs and their attorneys, and ordered the defendants to account for rents and revenues accrued during their possession. Thus the plaintiffs obtained all which they could have obtained under the trespass to try title count, and much argument is presented as to whether this was or was not such an action. Since plaintiff-appellees now urge that theirs is not a trespass to try title action, in the face of such abandonment it is probably unnecessary to consider such form of action as supporting the summary judgment rendered. *But* they also seek to rely on legal reasons to support the judgment — deeds improperly notarized and acknowledgments of some deeds by a party in interest — and they seek to show their establishment of a chain of title by reference to their pleadings. As to that, suffice it to say that pleading are not the character of proof required for summary judgment. Rule 166-A, Texas Rules of Civil Procedure. In Land v. Turner, 377 S.W. 2d. 181 (Tex. 1964), the Supreme Court summarized the burden of plaintiffs-appellees under this count:

> "To recover in trespass to try title, the plaintiff must recover upon the strength of his own title. Hejl

> v. Wirth, 161 Tex. 609, 343 S.W. 2d 226 (1961). He may recover by (1) proving a regular chain of conveyances from the sovereign, (2) by proving a superior title out of a common source, (3) by proving title by limitations, or (4) by proving prior possession, and that the possession had not been abandoned."

Each of these is an independent ground of recovery, but none of them were proved in the summary judgment action before us, so that the judgment cannot stand on such grounds in any event, whether abandoned or not.

[2, 3] Plaintiffs pleaded and admitted the execution and delivery of the deeds, their acceptance and retention of the consideration, and the present possession of the lands by the defendants. They contend that they should not be bound by them because of a form of fraud arising out of the deeds having been delivered in blank as to the grantee, the insertion of the name of defendant Athey as such grantee, and the existence of a fiduciary relationship between them and Athey. Stripped of the trespass to try title count, the plaintiffs' cause of action is one for cancellation of deeds by the grantors for fraud. Yet the judgment goes farther. It first cancels the seven deeds in which the plaintiffs are grantors and Athey is the sole grantee. It then orders Athey and the other defendants to execute deeds of special warranty to the plaintiffs and their attorneys, and to execute certain deeds between the various defendants, some conditioned on the delivery to the clerk of the court of other deeds, apparently to make up deficiencies and correct inequities among those defendants who were strangers to the canceled instruments, but deraigned their title thereunder. The various defendants were ordered to account for rents and revenues accrued during their possession, and in turn were to receive back out of such funds the consideration paid for their deeds. This being a summary judgment case, when we speak of the evidence or proof throughout this opinion, it will mean that we have viewed same in the manner re-

quired under Rule 166-A, T.R.C.P., as to which see Great American Reserve Ins. Co. v. San Antonio Pl. Sup. Co., 391 S.W. 2d 41 (Tex. 1965). If we assume that the proof was sufficient to warrant cancellation (but we expressly find that it was not), the judgment rendered cannot stand, for it goes beyond cancellation and, in effect, grants recovery as though in trespass to try title. Cancellation was a necessary preliminary step to recovery of the land. Chicago T. & M. Ry. Co. v. Titterington, 84 Tex. 218, 19 S.W. 472; Deaton v. Rush (1923), 113 Tex. 176, 252 S.W. 1025. But the establishing of an equitable right — that they were entitled to cancellation — and the simple act of cancellation, could not operate to take the land away from all who were in possession under claims of title and restore it to plaintiffs. As a very practical matter, the solemn act of canceling the deeds — that they "be set aside, voided and held for naught" — left nothing to be conveyed, as thereafter ordered by the judgment, and certainly nothing to warrant as title.

[4-7] Very simply stated, the suit was for cancellation, but the judgment was for complete recovery of the land, and it was against all parties claiming an interest therein. Athey was the only defendant who was a party to the canceled instruments. The other defendants were in possession under duly recorded deeds. Not being a party to the instruments sought to be canceled, they could have been made parties to the conflict only because of their interest in the land. Clearly, then, the judgment operates as an adjudication of title to an interest in land. These strangers to the canceled instruments, who were in possession under deeds of record, have had their title and possession taken from them in a summary proceeding seeking cancellation. Such an action to cancel a voidable deed is characterized as an in personam action, rather than a suit for recovery of land. Deaton v. Rush, 113 Tex. 176, 252 S.W. 1025; Glenney v. Crane, 352 S.W. 2d 773, ref., n.r.e.; (but see Free v. Owen, 131 Tex. 281, 113 S.W. 2d 1221). Regardless of its characterization, it cannot operate to deprive these defendants of their title and pos-

session without an adjudication of the basis of their claims to such title. We think the judgment is also erroneous for that reason. Rule 789 provides that "Under such plea of 'not guilty' the defendant may give in evidence any lawful defense to the action except the defense of limitations, which shall be specially pleaded." This is held to include both legal and equitable defenses. Smith v. Baker (Civ. App. 964), 380 S.W. 2d 725; ref., n.r.e., 383 S.W. 2d 570. And where the defendant pleads "not guilty", the burden is on the plaintiff, as movant for summary judgment, to show that the defendant had no such defenses. Briggs v. Freeway Park Development Company, Tex. Civ. App., 366 S.W. 2d 270, ref., n.r.e.; Gage v. Owen, Tex. Civ. App., 396 S.W. 2d 189, n.w.h.; 56 Tex. Jur. 2d, "Trespass to Try Title", p. 248, § 119.

[8] We are of the opinion that the prior uncanceled deeds, pleaded by the defendants, is a bar to the judgment rendered. Two sets of deeds were executed by the plaintiff-grantors in this transaction. These deeds were identical as to the parties and properties, except that one set was on "Oklahoma forms", while the other set was on "Texas forms". This suit sought cancellation of the "Texas form" deeds only. When the transaction for the purchase-sale of the property was originally consummated, the deeds (seven in number) of the grantors were executed and delivered on the printed Oklahoma forms and the consideration of $105,000.00 was paid. About a week after the delivery of these deeds, on the suggestion of one who acquired an interest thereunder, seven new deeds were executed and delivered on printed Texas forms by all parties grantors. Both sets of deeds were executed in blank as to the grantee, the name of defendant Athey was inserted as grantee by him on these Texas form deeds, and they were thereafter filed for record in Pecos County. The Oklahoma form deeds still remain in the possession of Athey, uncanceled, and unchallenged in fact, and of a form sufficient to pass title fully under Texas law. Perhaps the situation is as simple as this: "A" having given two deeds to "B" conveying Whiteacre, and having sought

cancellation of only one of them, has gained nothing, for the other deed is still outstanding until canceled, even as was the one canceled. Whalem v. Richardson, Tex. Civ. App., 353 S.W. 2d 941, n.w.h., cites the controlling rule of law:

> "A deed obtained by fraud is not void but voidable only as between the parties to this suit, appellee's title is prima facie good, and it could only be avoided by decree annulling and cancelling the deed executed by appellants. Deaton v. Rush, 113 Tex. 175, 252 S.W. 1025; Michna v. Crane, Tex. Civ. App., 28 S.W. 2d 837; Wilkins v. Abercrombie, Tex. Civ. App., 162 S.W. 2d 445; Meiners v. Texas Osage Cooperative Royalty Pool, Inc., Tex. Civ. App., 309 S.W. 2d 898."

[9] The judgment is also erroneous in that there is an absence of necessary parties, which absence was raised by pleas to abate, and was not cured by the unilateral stipulation of the plaintiffs (referred to as paragraph 31 of their pleadings) as to any innocent purchasers for value.

On the basis of the foregoing, the judgment granting appellee-plaintiffs' motions for summary judgment is reversed and the cause remanded for trial.

MOBIL'S MOTION FOR SUMMARY JUDGMENT

[10] In addition to granting plaintiff's motions for summary judgment, the judgment here appealed from also denied the motion for summary judgment of Mobil Oil Corporation. By such motion Mobil contended that an oil and gas lease owned by it on a portion of the land involved was a valid and existing lease, and that the fee title it obtained to an undivided interest in the property should be upheld because it was an innocent purchaser for value. The granting of plaintiffs' motion for summary judgment, as noted, ordered the reconveyance of the fee title, and such order also ordered the cancellation of an oil and gas lease under which Mobil was operating and producing, and declared the interest unleased as of

March 20, 1962. The premises being in and a part of a unitization agreement, the order also substitutes the plaintiffs as members of such unit from the beginning and effective date of such unitization. Our reversal of such summary judgment order sends the mattter back for trial, but we are of the opinion that nothing more remains to be determined as to the cancellation of the oil and gas lease of Mobil, and that Mobil is entitled to judgment of rendition under its motion for summary judgment asking that the lease be declared valid. The original lease was for a ten-year term beginning March 19, 1952. On May 19, 1961, some ten months prior to expiration of the primary term, Charles Athey, individually, as trustee for others not parties hereto, and as attorney in fact for the plaintiffs and others, executed an extension agreement, extending the lease for a term of two years. It is this extension agreement which the plaintiffs attacked on the ground that it was secured through fraud and conspiracy or that Athey was without authority to extend the lease. We think the proof offered overcomes both of these contentions. Any and all acts relied on to establish fraud occurred long after the execution of the extension agreement on May 19, 1961, and there is no fact question as to fraud in the execution. The power of attorney under which Athey acted was executed by plaintiffs and other interest owners and placed of record in 1960. It provides Athey with the power to lease for such terms and prices as he sees fit, but does not specify that he can extend leases. We think the powers given are sufficient to cover the extending that was done here, for the instrument gave Athey the power to do any and everything about the premises which the grantors could do; also, in effect, the extension agreement was a lease. Even if the power did not exist in the instrument itself, the plaintiffs have accepted the benefits of the extension agreement, thus ratifying what was done, and have estopped themselves from now disavowing what was done, by standing by while Mobil expended large sums for development. Mobil paid $72,423.51 in consideration of the extension of the lease. The plaintiffs admit in their

pleadings and depositions that they received and accepted this money, and delay rentals under the extended lease were paid to the depository bank selected by the plaintiffs for the respective account of each. The action of the trial court in setting aside and holding for naught the Extension of Lease dated May 19, 1961, extending the oil and gas lease of March 19, 1952, recorded in Volume 192, page 368, Lease Records of Pecos County, Texas, is reversed and judgment here rendered declaring same valid.

[11] Mobil Oil Corporation's motions for summary judgment sought to validate its fee title to an interest in the property here involved on the basis that it was an innocent purchaser for value without notice of the alleged fraud. We are of the opinion that under the proof required for summary judgment this position is not established as a matter of law, and that a fact question exists. Mobil purchased its interest from Athey in October of 1962. The alleged acts of fraud are in connection with the sale by the plaintiffs to Athey in the early part of that year (March and April). One J. K. Brim, Jr., an employee and admittedly an agent for Mobil, participated in the transactions. Under ordinary circumstances, knowledge of the agent is imputed to the principal. But Mobil seeks to avoid this under an exception to the general rule, by showing that the agent was violating his duty to the principal and was on a course of dealing for himself.

[12, 13] A bona fide purchaser is one who makes a good faith purchase of real property for a valuable consideration without actual or constructive notice of an outstanding equity or in adverse interest or title. Garrison v. Crowell et al., 67 Tex. 626, 4 S.W. 69; Middleton et al. v. Johnston, 110 S.W. 789, Tex. Civ. App., err. ref'd; Houston Oil Company et al. v. Niles, 255 S.W. 604, Com. App. Our holding, as summarily stated earlier in this opinion, is that fraud was not established as a matter of law for purposes of summary judgment — that a fact question exists. That is not a finding that as a matter of law there was no fraud, but leaves the matter to be determined on trial. If in fact

there was fraud, Mobil's agent, Brim, was in a position to have knowledge of it. Mobil has the burden, as movant for summary judgment here, to establish as a matter of law that Brim was acting so contrarily to their interests as to except them from the general rule that notice to the agent is notice to his principal. The exception is a well established rule of law and is well-stated in Holmes v. Uvalde Nat. Bank, 222 S.W. 640 (Civ. App., err. ref.):

> "The rule imputing notice of the principal of the acts of agents is usually based upon the theory that it is the duty of the agent to communicate to his principal the knowledge possessed by him relating to the subject-matter of the agency, and the presumption that he has perfoimed that duty. But this presumption is destroyed where the agent, though nominally acting as such, is in reality acting in his own or another's interest, and adversely to that of his principal." (Citing numerous authorities).

We are of the opinion that the nature of Brim's acts, and the time of their commission as relates to the time of Mobil's purchase, are not so established as a matter of law as to bring them under the exception and entitle Mobil to summary judgment.

The order granting plaintiff's motions for summary judgment is in all things reversed and the cause remanded for trial; in its denial of Mobil's motion for summary judgment, the order is reversed as to the cancellation of Mobil's lease above described, and judgment is here rendered declaring such lease valid; and the denial of Mobil's motion for summary judgment is otherwise affirmed.